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No. 1093

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, AN UNINCORPORATED ASSOCIATION; JOHN T. KENNEDY, JAMES P. PALM, AND PAUL L. WARD, INDIVIDUALLY, AND FOR ALL OTHERS SIMILARLY SITUATED,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION, AND THE PULLMAN COMPANY, A CORPORATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the Northern District of Illinois, entered on November 30, 1966, denying the prayer of the appellants to set aside and enjoin an order of the Interstate Commerce Commission, and dismissing their Complaint, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW.

The opinion of the specially constituted court of three judges in the United States District Court for the Northern District of Illinois, Eastern Division, is not yet reported. A copy of the opinion of the District Court is attached hereto as Appendix A. A copy of the dissenting opinion is attached hereto as Appendix A-1. A copy of the final order of the District Court is attached hereto as Appendix B.

The prior reports of the Interstate Commerce Commission in the proceedings under review are found at 268 I.C.C. 473, 276 I.C.C. 5, 294 I.C.C. 703, 306 I.C.C. 138. The Order of the Commission under review is found at 322 I.C.C. 100, a copy of which is attached hereto as Appendix C.

JURISDICTION.

This suit was brought under 28 U.S.C. § 1336, to set aside and enjoin an order of the Interstate Commerce Commission. The judgment of the District Court was dated and entered on November 30, 1966, and notice of appeal was filed in that court on December 29, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Lowden*, 308 U. S. 225, 60 S. Ct. 248, 84 L. Ed. 208.

Interstate Commerce Commission v. *Railway Labor Executives' Association*, 315 U. S. 373, 62 S. Ct. 717, 86 L. Ed. 904.

STATUTE INVOLVED.

Section 5 (1) of the Interstate Commerce Act (49 U. S. C. § 5 (1)) is involved and provides in material part:

"(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises."

QUESTIONS PRESENTED.

1. Whether the Interstate Commerce Commission, having made in 1947 and 1949 the findings required by Section 5 (1) of the Interstate Commerce Act and having approved a pooling of sleeping car operations on the basis of a pooling of both services and earnings and having denied protective conditions for Pullman conductors on the ground

that they were part of the pooling plan and would not be adversely affected so long as the pooling continued, exceeded its authority and acted in violation of the Act in holding that the pooling members could subsequently in 1962 amend the pooling plan to eliminate and change portions thereof, including elimination of Pullman conductors and changed earnings arrangements, while otherwise continuing the pooling, without obtaining Commission approval of the new pooling arrangement and without Commission consideration of protective conditions for Pullman conductors adversely affected by loss of employment.

2. Whether the Interstate Commerce Commission exceeded its authority and acted in violation of Sections 5(1), 17 (3), and 17 (11) of the Interstate Commerce Act, in violation of Sections 5 and 7 of the Administrative Procedure Act (5 U. S. C. §§ 1004, 1006), and in denial of due process under the Fifth Amendment to the Constitution of the United States in denying the appellants a hearing and in depriving Pullman conductors the protection accorded them by prior orders of the Commission in a proceeding in which the Commission refused to hold a hearing for reception of evidence and for the purpose of affording an opportunity for development of an orderly record for review.

3. Whether the Interstate Commerce Commission acted unlawfully in holding that the proposed agreement between the appellee The Pennsylvania Railroad Company and the appellee The Pullman Company would not result in an abridgment of the collective bargaining agreement between Pullman and the appellant Order of Railway Conductors and Brakemen (ORCB).

STATEMENT OF THE CASE.

This is an appeal from the final judgment of a specially constituted United States District Court of three judges dismissing a complaint brought by the Order of Railway Conductors and Brakemen, the collective bargaining agent for Pullman conductors employed by The Pullman Company, to set aside and enjoin an order of the Interstate Commerce Commission. One of the three judges filed a dissenting opinion.

Pullman is wholly owned by the major railroads of the United States, including Pennsylvania, its stock being 100% railroad owned since the anti-trust proceedings against Pullman in the period 1940-1946. *United States v. Pullman Company*, 50 F. Supp. 123; 53 F. Supp. 903; 55 F. Supp. 985; 64 F. Supp. 108, affirmed by an equally divided court in 330 U. S. 806. It is operated as a joint facility of the railroads in the furnishing of sleeping car service. Apart from ownership, the relationship between Pullman and the railroads resembles a partnership. A uniform operating contract between Pullman and each railroad, including Pennsylvania, governs the division of operations in performing sleeping car service as between Pullman and the railroads and also governs their division of revenues and expenses in such operations. In addition, each railroad receives dividends according to the amount of its stock ownership in Pullman irrespective of the profitability of sleeping car operations on a particular carrier.

In 1947 the Interstate Commerce Commission approved a pooling of both sleeping car services and earnings of the railroads, which then owned Pullman, under the provisions of Section 5 (1) of the Interstate Commerce Act (268 I. C. C. 473).

Because the railroads had predicted that after the expira-

tion of the 1947 pooling period on December 31, 1948, they would reduce Pullman to a "service company" the ORCB intervened in the 1947 proceedings before the Commission and requested that the Commission condition its order approving the pooling arrangement with protective provisions for Pullman conductors suffering loss of employment. The railroads denied the necessity of protective provisions and told the Commission that "Pullman conductors are still to function on the cars regardless of who owns the cars on which they function because the service is continued." The Commission held that protective conditions were unnecessary in its 1947 order, saying that "The plan clearly contemplates use of the present Pullman employees in the unified service, * * *" (268 I. C. C. 473, 491).

On June 3, 1949, the railroads filed a "Supplemental Application" to the Commission requesting approval of a revision in the pooling of earnings as between the railroads and Pullman as provided in a revised Uniform Service Contract between Pullman and each railroad. The proposed 1949 Uniform Service Contract contained extensive changes in the accounting and division of revenue and expense between Pullman and the railroads as compared to the 1947 pooling agreement. In addition, the language of section 2 of the 1947 pooling agreement, concerning the right of the railroads to operate their own sleeping car service, was changed in the 1949 Uniform Service Contract.

The change in the language of Section 2 was not mentioned in the railroads' 1949 application or during the hearing thereon. No suggestion was ever made that the changed language of Section 2 might authorize a future change in the pooling of Pullman sleeping car operations without Commission approval. On the contrary, the 1949 written application of the railroads, including Pennsylvania, stated:

"Under the proposed Uniform Service Contract Pull-

man will continue to furnish the same services as at present, and its operations will be conducted in the same manner. The principal difference of the proposed contract from the one approved by the Commission (in 1947) in this proceeding and now in effect consists in the provision for allocating Pullman's expenses among the railroads."

In the 1949 hearing a witness for the railroads, under the direction of railroad counsel, testified that "there is nothing in the proposed contract, or in the present Uniform Operating Contract, which would have the effect of impairing any rights or employment opportunities of the Pullman employees."

On August 22, 1949, the Commission issued its report and Supplemental Order approving and authorizing the continuance of the pooling subject to the conditions of its prior report. The 1949 report recited that a study had been made of Pullman's operations and its relations with the railroads served by it and that "it was decided not to make any change in those operations, but the study disclosed a need for certain changes in the basis of compensation received by Pullman from the railroads." The report then enumerated numerous changes in the new contract without any reference whatever to the changed language of Section 2. The report concluded (276 I. C. C. 5):

"We find that all of the applicants have assented to the new uniform service contract, the provisions of which will result in a just and reasonable consideration for the pooling of railroad service and earnings involved in the conduct of the sleeping car business approved in the prior report."

On May 29, 1962, Pennsylvania notified Pullman in writing as follows:

"We refer to the Uniform Service Contract between your company and this Company dated March 23, 1949,

as amended, modified and supplemented from time to time (hereinafter referred to as the Contract).[1]

In accordance with Section 2 of the Contract, you are hereby notified that The Pennsylvania Railroad Company exercises its right to request your company to furnish, effective October 1, 1962, a partial form of sleeping car service on the lines of this Company, as hereinafter set forth. Effective on the aforesaid date, the services to be rendered by your company under the Contract shall be:

'A. On all Joint Sleeping Car Lines—regular, extra, special and emergency—all of the services now performed by your company under the Contract.

'B. On all Local Sleeping Car Lines—regular, extra, special and emergency—as follows:

"'1. The furnishing of cars by your company, properly equipped and acceptable to this Company, to meet our requirements as determined by us from time to time.

'2. The furnishing by your company of linen and other supplies for such cars, except in connection with commissary service.

'3. The performance of customary yard electrical and air conditioning repairs on such cars.

'4. The performance of customary other yard repairs on such cars.

'5. The performance of customary shop repairs on such cars.

'6. The performance of customary interior car cleaning of such cars.'

"Effective on the aforesaid date, this Company will perform in connection with its sleeping car operations, the remaining services not set forth above.

"We will be prepared to meet with you at any early and mutually satisfactory date to modify the

1. The only amendment had been a modification pertaining to the 3% return on Pullman's working capital and depreciated investment for which the railroads had sought and obtained Commission approval (294 I. C. C. 703).

Contract in such manner as may be necessary to provide reasonable and non-discriminatory terms in connection with the services to be performed by your company on and after October 1, 1962."

On September 11, 1962, Pennsylvania and Pullman entered into an agreement effective October 1, 1962, of some printed pages containing numerous amendments to the 1949 pooling agreement designed to carry into effect the notice of May 29, 1962. The amendments had the effect of eliminating the use of Pullman conductors and Pullman porters in Local Sleeping car service which was still to be conducted by Pullman and Pennsylvania under the pooling, as amended, and of changing their allocation of revenues and expenses. The arrangement would be unique to Pennsylvania. No other railroad in the United States is operating under such a pooling arrangement. No consent to the amendments was obtained from other railroads, and no approval was obtained from the Commission.

On October 5, 1962, the United States District Court for the Northern District of Illinois enjoined implementation of the changes in the pooling agreement pending a determination by the Commission. *Brogan* v. *Pennsylvania Railroad Company*, 211 F. Supp. 881.

On October 15, 1962, Pennsylvania filed a petition with the Commission praying for a declaratory order that the proposed changes in the pooling agreement did not require the approval of the Commission under Section 5 (1) of the Interstate Commerce Act. The petition was filed under the same docket number carried by the original pooling proceedings in which the ORCB had been permitted to intervene in 1947. It was served on all parties of record in that proceeding including the ORCB. The ORCB filed a Reply and Resistance and prayed that the Commission fix a date and place for hearing and that ORCB be afforded an opportunity to be heard and to offer evidence in support

of the allegations of its Reply and Resistance. Subsequently ORCB sought leave to amend its Reply and Resistance. On March 19, 1963, the Commission assigned the proceeding for oral argument to be held on April 25, 1963. By motion dated March 27, 1963, ORCB moved the Commission to cancel the assignment of oral argument as premature and renewed its request that the Commission fix a date and place for a hearing. On April 22, 1963, the Commission issued its order disposing of the motions of ORCB to amend its Reply and Resistance, to cancel oral argument, and to fix a date and place for hearing as follows:

> "*It further appearing,* That granting the other relief sought by said repliant prior to the Commission's determination that it has jurisdiction over the matter, which question is to be orally argued before the Commission on April 25, 1963, would be premature:
>
> "*It is ordered,* That, except as otherwise disposed of herein, the motions of the repliant be, and they are hereby denied without prejudice to their renewal subsequent to our decision on the jurisdictional question, if such course of action is indicated at that time to be proper."

The oral argument before the Commission proceeded as scheduled on April 25, 1963. During his argument Mr. David L. Wilson, on behalf of Pennsylvania, was questioned by the Commissioners and replied as follows:

> "Commr. Webb: How do you reconcile your position with the assurance that was given by the Commission that conductors would not be prejudiced?
>
> "Mr. Wilson: Commissioner Webb, I think it can be explained in this way: The assurance the Commission was given by the railroads and which they repeated in their report was simply this: By entering into this pooling arrangement, by starting with this pooling arrangement, which was the only thing the railroads had to get the Commission's authority to do, the conductors weren't being hurt. By going into the pool, they were going to use Pullman and the con-

ductors, so the organizations could be assured that the very transaction, technically, which the Commission was approving, the entering into the pool and the use of The Pullman Company, as an instrumentality, gave the conductors their jobs.

• • • • •

Commr. Murphy: You haven't pulled out?

Mr. Wilson: *We won't be entirely out.*[2]

Commr. Murphy: There are only two items that you are dropping?

Mr. Wilson: What are we withdrawing from The Pullman Company is service inside the cars, for the passengers, the publication of tariffs, collection of fares, provision of porter service and provision of commissary service in the cars. *This doesn't terminate the pool.* We are withdrawing in part. We are arranging for a partial service to use the phrase that the Commission uses.

Long statements were made by the railroad to the Commission in '49 when the presently existing Uniform Service Contract was approved. This was prepared by very distinguished predecessors of mine in the Commission's bar, but I must beg off from being bound by what the counsel for the railroads said in '49. This is my case now."

On January 16, 1964 the Commission entered its order (Appendix C), with no reference to its "jurisdiction", declaring:

That Pennsylvania's proposed plan for operating its sleeping car service and its contract of September 11, 1962, with Pullman "are fully contemplated by the terms of the pooling agreement and Uniform Service Contract approved by this Commission in the several prior reports on this proceeding, and are not inconsistent therewith;"

That no material changes in sleeping car service have been brought to the Commission's attention as being wrought by Pennsylvania's proposal as to warrant a hearing; and

2. Emphasis is supplied in this Statement unless otherwise noted.

That no abridgment of the ORCB collective bargaining agreement with Pullman would result from Pennsylvania's proposal and that a hearing for the presentation in evidence of the agreement is not necessary.

The Commission then found that Pennsylvania's proposal and its contract of September 11, 1962, with Pullman do not violate the outstanding orders of the Commission and do not require specific approval of the Commission.

The petition of the ORCB for reconsideration of the Commission's order of January 16, 1964, was denied.

The appellants brought the present suit to set aside the order of the Commission and to restrain Pennsylvania and Pullman from putting into effect the proposal and amendments to the Uniform Service Contract. The three-judge court found that Pennsylvania's proposed modification of the Uniform Service Contract was not a new or changed arrangement for pooling and did not require the approval of the Commission under Section 5(1) of the Act. The dissenting opinion expressed the view that Pennsylvania had proposed a complete change and modification of the pooling arrangement which under Section 5(1) required a hearing by the Commission and the taking of further evidence to determine whether the new arrangement would be in the interest of better service to the public or of economy of operation, and that approval by the Commission should be conditioned on provisions to insure employee-protection.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

Section 5(1) of the Interstate Commerce Act Requires That the Pennsylvania-Pullman Revision of the Pooling Be Submitted for Approval of the Commission.

There are some 600 Pullman Conductors employed in sleeping car service. Their average age is approximately 57 years. Due to advanced age and lack of training for other employment most of them would find it difficult, if not impossible, to obtain other employment either within or without the railroad industry.

The order under review now denies these employees the job security repeatedly assured to them both by the railroads, including Pennsylvania, and the Commission in the prior proceedings in this docket. In all former pooling proceedings the railroads and the Commission repeatedly asserted that as long as sleeping car service continued to be operated under the pooling arrangements approved by the Commission in 1947, as amended and approved in 1949, the pooling plan itself provided for the security of Pullman employees.

In both the 1947 and 1949 proceedings the railroads repeatedly said that Pullman conductors would lose their jobs only if a particular railroad decided to terminate the pooling and thereafter operate part or all its own sleeping car service "outside of the pooling plan." In such event they said that Pullman would "lose a customer" and employees would therefore lose jobs.

In the proceedings under appeal the Commission, almost twenty years later, held that the pooling arrangement had always meant that any railroad could compel Pullman to render any of its services or furnish any of its facilities as the railroad might from time to time wish to receive from Pullman. Thus, if a railroad demanded that Pull-

man furnish its sleeping cars and all of its services except conductors, Pullman must comply. And the standard form of contract under which Pullman has performed sleeping car service equally for all railroads must be amended "to provide reasonable and non-discriminatory terms" for the newly devised sleeping car service. The Commission has removed itself from this performance: it says that it need not hold a hearing or receive evidence as to the manner in which the amendments would affect and change the pooling operations or the findings made by the Commission in its prior proceedings pursuant to Section 5(1) of the Act required for safe-guarding the public interest involved; that it need not give its approval to the new pooling arrangement or to the special form of contract applicable to Pullman and the requiring railroad to see whether its terms are reasonable and non-discriminatory; and that it need not consider protective conditions for employees cast out by the new arrangement. Thus the order under review strips Pullman Conductors of the security said to be provided them by the pooling plan as described in the prior proceedings of the Commission.

The job security of Pullman employees has been precarious at best since the anti-trust proceedings against Pullman in the early 1940 period. The anti-trust decrees were designed to eliminate Pullman's monopoly of sleeping car service and to encourage individual railroads or third parties to provide sleeping car service in competition with Pullman. The anti-trust decrees, however, only required Pullman to operate on part of the lines of a railroad in competition to other independent sleeping car operations by the railroad or some third party. *Brogan* v. *Pennsylvania Railroad Company*, 211 F. Supp. 881. The decrees did not require Pullman to disregard its collective bargaining agreements and engage in a noncompetitive joint Pullman-Railroad pooled sleeping car operation over all the

lines of the railroad, with some Pullman employees but not with others as the railroad might dictate. The final anti-trust decree of January 4, 1946, specifically guarded against such an interpretation by providing:

> "This order is made without prejudice to the rights of the employees of the Pullman Company under existing contracts and practices."

In accord with the anti-trust decrees, the Uniform Operating Contract governing the pooling approved by the Commission in 1947 contained the following provisions:

> "Section 2. In case the Railroad shall at any time desire to furnish and operate its own sleeping cars and the usual and commissary service therein for part of its requirements, or shall desire some third party to do so, and *shall request Pullman to furnish sleeping cars and the usual and commissary service therein for the remainder of the requirements of travel over the Railroad's lines,* Pullman will furnish such partial service to the extent that it has sleeping cars of the required type and floor plan available therefor in its fleet of equipment *and all of the terms of this contract shall be applicable to such cars.*"
>
> "Section 5. Pullman shall have the right to collect from the occupants of all cars operated by it hereunder for the use of seats and berths and other accommodations therein * * * *and shall provide suitable employees for collecting such fares and charges and to provide the usual sleeping car and other services to the passengers therein;* such employees shall when on duty be subject to the rules of the Railroad governing its own employees."

The Uniform Operating Contract between Pullman and each railroad which governed the pooling was described to the Commission by the railroads as in conformity with the Memorandum Agreement between the railroads and as "uniform and nondiscriminatory on all railroads." The railroads further said:

"The terms of the new form of contract which relate to the distribution between the parties of the physical acts involved in the actual transportation service *are not materially different than those that appeared in the old Pullman contracts*".

The provisions in the Memorandum Agreement, which are paraphrased in the second and third paragraphs of the order under review (Appendix p. xxi), were never part of the pooling plan as defined in the 1947 Uniform Operating Contract. These provisions pertained to a possible *future* plan of the railroads to reduce Pullman to a "service company" after the expiration of the 1947 "interim period" pooling which would terminate by its terms on December 31, 1948. The projected plan to reduce Pullman to a service company after the "interim period" was later abandoned. In the 1947 proceedings, it was only a prediction and not a part of the 1947 pooling. Mr. Harding, a member of the Governing Committee for the railroads, testified in the 1947 hearings under the guidance of railroad counsel that when Pullman was reduced to a service company the railroads would then have to come back to the Commission and that would be the time to consider any labor problem:

"Redirect Examination.

* * * * *

Q. At any rate, Mr. Harding, when this servicing company is formed, in your view of it, would the carriers not have to come back to the Commission?

A. I believe they would have to.

Q. If they did come back to the Commission, and if there was a labor problem at that time, would not that be the time for the labor to be taken care of?

A. It would, in my judgment.

Q. When you talked about the carriers being absorbed—employees being absorbed, I mean—did you not mean that they would be taken care of by the car-

rier, or probably needed by the carriers in the performance of the same duties?

A. That is what I meant."

On June 3, 1949, the railroads filed a "Supplemental Application" to the Commission which recited that their experience had convinced them that "this service could be more advantageously performed at present by Pullman in railroad ownership than by other means; and that no reason now exists for any drastic change in the present method of operating the sleeping car business."

In their 1949 Supplemental Application, in respect to the pooling of services, the railroads said that the cars would continue to be "manned, serviced, and maintained" by Pullman. No mention of the change in language of Section 2 of the 1949 contract was made by the railroads in the 1949 proceedings before the Commission. Nothing concerning it appears in the Commission report. No one then suggested that it conferred a blanket future approval by the Commission to an individual railroad to demand that Pullman accede to whatever changes the railroad desired in the pooling agreement without submission of the revised pooling arrangements for Commission approval as provided by Section 5(1) of the Interstate Commerce Act and without incurring any liability for protective conditions for the consequent loss of employment. No claim was then made that each railroad could determine for itself what "partial service" it desired of Pullman irrespective of Pullman's collective bargaining agreements, or that each railroad could determine for itself what terms would be "reasonable and non-discriminatory", or that all such future changes in the pooling agreement governing sleeping car service would automatically carry the unfettered approval of the Commission.

On August 22, 1949, the Commission issued its report and Supplemental Order approving and authorizing the con-

tinuance of the pooling subject to the conditions in its prior report. The report found that all the applicants, including Pennsylvania, had assented to the proposed modification of the pooling plan, and that its provisions "will result in a just and reasonable consideration for the pooling of railroad service and earnings involved in the conduct of the sleeping car business approved in the prior report (276 I. C. C. 5).

Prior to this case, the Commission has never held that a railroad may "withdraw" part of the pooling agreement itself, and by extensively amending and changing the agreement to suit its individual desires, continue under a revised partial pooling arrangement without prior Commission approval.

Withdrawal of all or part of the lines of the railroad from a pooling arrangement is one thing. "Withdrawal" of a part of the approved pooling agreement itself, by extensively amending and modifying it, is another thing. Withdrawal of all or part of the lines of the railroad from the pooling doesn't change the pooling agreement although even then it may change the pooling. In any event Pennsylvania's proposal did change the pooling agreement. If the railroads can obtain Commission approval of a pooling arrangement one day and then "withdraw" from part of the pooling by revising the pooling agreement the next day without Commission approval, the findings required by Section 5(1) of the Interstate Commerce Act are rendered utterly meaningless and the right to seek protective provisions are entirely nullified as well as the protection said to have been afforded employees by the original approval.

In 1958 the New York Central Railroad *terminated* the pooling contract as to Pullman sleeping cars operated on its local lines. The New York Central thereafter operated its own local line sleeping cars entirely outside the pooling arrangement. Some 100 Pullman conductors lost their em-

ployment as a result of the New York Central termination of the pooling as to local service. The ORCB filed a petition with the Commission for reconsideration of its 1947 order holding protective conditions unnecessary or in the alternative to require New York Central to submit a "proposed de-pooling plan to Commission for approval".

In the 1958 proceedings before the Commission the New York Central filed a reply, in which all the other railroads, including Pennsylvania, concurred, saying:

> "Petitioner itself appears to recognize fully the lack of power of the Commission over 'de-pooling' for it argues only that Commission approval is required where an existing pooling arrangement is modified. *But this is so only because substantial modification of an existing pooling arrangement amounts to the creation of a new pool. What requires approval is the new pooling arrangement and not withdrawal from or termination of the old one.* Furthermore, in this case, *the pooling agreement is being continued unchanged in any event and there is no modification whatever.*"

The Commission adopted the New York Central contentions in 1958 (306 I. C. C. 138). In the order under review it ignored these same contentions when advanced by appellants, that is, that the Pennsylvania-Pullman modifications resulted in a new pooling arrangement requiring Commission approval.

In the twenty years since the railroads purchased Pullman and obtained Commission approval for unified pooled sleeping car operations only two railroads have terminated the pooling arrangement, that is, the New York Central and the Rock Island. If it had been more economical or efficient to operate "outside the pooling" all railroads would have long since terminated the pooling contract. Pennsylvania wants to stay inside its own revised pooling, eliminate Pullman conductors by amending the pooling agreement

without Commission approval, and avoid incurring any liability for such protective conditions as the Commission might impose.

Pennsylvania has never made any claim that its proposed new method of operation will result in better service to the public. Since the commencement of the sleeping car business the Pullman conductor has devoted his full time to the needs of sleeping car passengers, who pay extra fare. He stays with the cars enroute. He not only collects sleeping car tickets but supervises the porters, reassigns passenger space in sleeping cars, wires ahead for space, and attends to the other needs of the sleeping car passengers.

In the 1947 proceedings these considerations were urged by the railroads in support of the statutory finding of "better service." The attention of the Commission was then directed to the fact that the train conductor and other train personnel are frequently changed enroute. Pennsylvania now proposes to leave the Pullman cars unsupervised except for collection of sleeping car tickets by the train conductor who necessarily must spend the greater part of his time in other parts of the train in collection of coach tickets, in supervision of train personnel, and in supervision of train operating rules. The findings of "better service" to the public made by the Commission in 1947 and 1949 are now to be entirely ignored.

Appellants' Right to a Hearing.

Even it if were assumed, arguendo, the Pennsylvania had a contractual right to demand the type of "partial service" it now claims, the fact remains that to accomplish it Pennsylvania and Pullman entered into many pages of amendments and changes of the 1949 pooling agreement. Pennsylvania calls those amendments "a partial withdrawal from the pooling." Such a partial withdrawal

leaves a partial pooling in existence. Section 5(1) of the Interstate Commerce Act specifically requires approval of even a "partial pooling." The Commission in 1947 and 1949 approved a pooling of both earnings and services of sleeping car service as historically operated. The Commission has never held a hearing and made the required findings for approval of the partial pooling now proposed by Pennsylvania.

The Commission evidently thought it could analyze the changes in the pooling of services from inspection of the amendments made by Pennsylvania and Pullman. It was, however, impossible to determine, by this method, the effect these changes would have on the pooling of earnings. This question could only be determined after analysis and testimony by expert transportation accountants. The amendments of their accounting arrangements were extensive and of a certainty would cause a substantial change in the pooling of earnings. Yet ORCB was denied the opportunity of presenting evidence and of cross-examining Pullman and Pennsylvania on this issue and other issues involved. It was also denied an opportunity to offer its evidence in a hearing in which an orderly record could be made. In appealing from the Commission order under review appellants were compelled to reproduce a large part of the Commission record in four prior hearings and proceedings in this docket, that is, from the separate proceedings of the Commission in 1947, 1949, 1955, and 1958. This was required because the Commission, in the order under review, purportedly considered "the record in the above entitled proceeding" which included all of the four prior proceedings and forced appellants to comb through thousands of pages of record and to reproduce over eleven hundred printed pages of the Commission's record in its prior proceedings. Such a procedure is, we submit, unfair.

The order should be reversed because of the denial of a hearing. (*Morgan* v. *United States*, 298 U. S. 468; 49 U. S. C. Secs. 5(1), 17(3); 5 U. S. C. Sec. 1004).

The Commission Lacked Jurisdiction to Determine That the Collective Bargaining Agreement of Pullman Conductors Would Not Be Abridged by the Proposed Changes.

In the order under review the Commission recited, in the next to the last paragraph, that appellants sought a hearing to introduce into evidence, among other things, their collective bargaining agreement with Pullman. The collective agreement was offered as relevant to the issue of protection. This was particularly so in view of the railroads' committment to labor, which had impressed the Commission so much in the 1947 proceedings (268 I. C. C. 483, 491). Although the Commission did not grant a hearing and appellants had not tendered the collective agreement for the purpose of a Commission adjudication as to its obligations, but only on the issue of the protection afforded by the pooling, nevertheless the Commission arbitrarily adjudged in the order under review that it appeared that the Pennsylvania—Pullman changes in sleeping car service would not result in any "abridgement" of appellants' collective agreement with Pullman. The Commission clearly exceeded its jurisdiction. (*Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561; *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239). Its holding is highly prejudical since it may adversely influence a neutral in any submission that appellants may make to the National Railroad Adjustment Board under the provisions of the Railway Labor Act, 45 USC, Section 153.

Importance of Questions.

This case presents a question of importance in the interpretation and application of Section 5(1) of the Interstate Commerce Act (49 U. S. C. Sec. 5(1)). Under the order of the Commission and the decision of the District Court the Commission is held to have power to delegate authority in advance to the members of an approved pooling agreement thereafter to revise and modify the pooling as they see fit without the revised pooling arrangement being approved by the Commission upon the findings required by the Act. The order and decision will result in untold hardship in this instance and will constitute a continuing invitation for such unapproved pooling revisions in the future.

Section 5(1) of the Act provides for Commission approval of any pooling, partial or otherwise, upon the required statutory findings and "upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises." Under almost identical statutory provisions this Court in *United States* v. *Lowden*, 308 U. S. 225, upheld the power of the Commission to include in its order conditions protective of employees adversely affected by authorization to a railroad to lease the properties of another railroad. In *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, this Court again upheld the power of the Commission to impose protective conditions for railroad employees adversely affected by the Commission's order authorizing a railroad to abandon a portion of its lines.

The decisions of this Court cited above and the Acts of Congress recognize that the morale and welfare of the railrood industry's labor force is of importance to the United States.

Employees can be cast out of employment as easily by a revision of a pooling arrangement as by leasing or an abandonment of a railroad line. The result is equally devastating.

The livelihood of the 600 members of the craft of Pullman Conductors with long years of service to the railroad industry is threatened by a stratagem intended to evade Commission consideration of job protection for them as they are thrown into unemployment.

CONCLUSION.

For the reasons stated, the questions presented in this case are substantial, and they are deserving of this Court's review.

Respectfully submitted,

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APPENDIX A.

UNITED STATES DISTRICT COURT.
For the Northern District of Illinois,
Eastern Division.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, etc., *et al.*, *Plaintiffs*,
vs.
UNITED STATES OF AMERICA, *et al.*, *Defendants*.

No. 64 C 1401.

MEMORANDUM OPINION.

Before SWYGERT, *Circuit Judge*, and PERRY and MAROVITZ, *District Judges*.

MAROVITZ, *District Judge*. Plaintiffs bring this action to enjoin and set aside an order of the Interstate Commerce Commission entered in Docket No. 29592 entitled, "Proposed Pooling of Railroad Earnings and Service Involved in Operation of The Pullman Company Under Railroad Ownership," reported as 322 I. C. C. 100.

Plaintiffs are (a) the Order of Railway Conductors and Brakemen, an unincorporated association, which is the representative of Pullman conductors; and (b) three individuals who are employed as Pullman conductors.

Defendants are the United States of America, the Interstate Commerce Commission, The Pennsylvania Railroad Company, a corporation, and The Pullman Company, a corporation.

This cause came on for hearing on October 27, 1966, before this statutory three-judge United States District

Court which finds that it has jurisdiction of the subject matter hereof and of the parties hereto.

Because the Interstate Commerce Commission's Order of January 16, 1964, herein sought to be set aside, begins with the phrase, "Upon the consideration of the record in the above-entitled proceedings, . . ." and because the record of the Commission in proceedings had in Docket No. 29592 "contains extensive testimony and numerous exhibits and other documents which pertain to issues wholly foreign to the issues in the matter before the Commission involved in this cause," all of the parties to this action entered into a stipulation which provided, among other things, that certain portions of the record of the Commission in Docket No. 29592 should be deemed a full and complete designation of all parts of the record of the Commission in said proceedings which, in the opinion of any party is in any way pertinent to the Commission's order of January 16, 1964, or to the issues of this proceeding. The parties accordingly submitted to the court the pertinent record, as stipulated, packaged in a volume entitled, "Joint Appendix of All the Parties" which this court has examined and has considered together with the pleadings and briefs and oral arguments of counsel.

Following the entry by the Commission of its January 16, 1964 Order here involved, the petition of plaintiff Order of Railway Conductors and Brakemen (ORC&B) for reconsideration by the Commission of its Order was denied.

To better comprehend the issues presented by the instant case, we must go back to 1940. At that time the United States brought an anti-trust proceeding in the United States District Court for the Eastern District of Pennsylvania, at Philadelphia, alleging the violation of §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act by Pullman, Incorporated, Pullman Standard Car Manufacturing Company and the Pullman Company. In a decision reported

at 50 F. Supp. 123 (1943), the court concluded that there had been a violation of the Sherman Act and decided (53 F. Supp. 908) that the public interest required the complete separation in ownership and direction of the business of manufacturing and the business of operating sleeping cars. The court directed Pullman, Inc., to choose whether it wanted to divest itself of its manufacturing business (Pullman-Standard Manufacturing Company) or its service company (Pullman Company). Pullman, Inc., elected to dispose of its service company and the court approved the executory contract of sale of stock to certain purchasing railroads (64 F. Supp. 108).

Section 5(1) of the Interstate Commerce Act, 49 U. S. C. § 5(1), provides, in part—

> "§ 5. *Combinations and consolidations of carriers. Pooling; division of traffic, service, or earnings*
>
> "(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter . . . to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and

regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises . . ."

In 1946, certain railroads, including the Pennsylvania Railroad, made application under above quoted Section 5(1) for approval of a proposed pooling of earnings and service involved in the sleeping car business by the Pullman Company under railroad ownership and on May 6, 1947, the Interstate Commerce Commission entered its report and order in Docket 29592 approving and authorizing the proposed pooling. A Uniform Operating Contract was put into effect, retroactively, as of July 1, 1946, and thereafter was extended by agreement on expiration.

A subsequent Supplemental Application to the Commission under Section 5(1) was made by the railroads for an order approving and authorizing a proposed further continuance and revision of the existing pooling arrangement under a new, proposed Uniform Service Contract and on August 22, 1949, the Commission entered its Supplemental Order approving and authorizing the continuance of the pooling subject to the conditions prescribed in the prior report.

Section 2 of the new Uniform Service Contract reads:

"Sec. 2. During the term of this contract Pullman shall furnish sleeping car service on the Lines of the Railroad, as hereinafter specified. In case the Railroad at any time desires to furnish part of such service in connection with its sleeping car operations, and shall request Pullman to furnish a partial form of sleeping car service on Lines of the Railroad, Pullman shall furnish such partial service on reasonable and non-discriminatory terms; and this contract shall be subject to such modification as may, in the particular case, be necessary to provide reasonable and non-discriminatory terms therefor."

On May 29, 1962, the Pennsylvania Railroad notified the Pullman Company by letter that in accordance with Section 2 of the Uniform Service Contract it was exercising its right to request Pullman to furnish, effective October 1, 1962, a partial form of sleeping car service on the lines of Pennsylvania. After setting forth the services to be rendered by the Pullman Company (sometimes hereinafter "Pullman"), the letter stated that effective on October 1, 1962, the Pennsylvania Railroad Company (sometimes hereinafter "Pennsylvania") would perform in connection with its sleeping car operations, the remaining services not listed therein for performance by Pullman.

On September 11, 1962, without making prior application to the Interstate Commerce Commission for authorization and approval under Section 5(1), Pullman and Pennsylvania executed an "Amendment to Uniform Service Contract" which provided for a partial form of sleeping car service by Pullman on local lines of the Pennsylvania Railroad, to become effective October 1, 1962, in line with the proposals set forth in Pennsylvania's letter to Pullman of May 29, 1962.

In a suit entitled *E. V. Brogan, et al.*, v. *The Pennsylvania Railroad Company and The Pullman Company* (No. 62 C 1661), filed in the United States District Court for this District on August 29, 1962, certain conductors of Pullman working on the sleeping car lines of Pennsylvania prayed for a declaratory judgment that the planned changes or arrangement by Pullman and Pennsylvania would be in disobedience of orders of the Interstate Commerce Commission and prayed that the defendant companies be enjoined from putting into effect the planned changes and from failing and neglecting to obey the orders of the Interstate Commerce Commission theretofore entered in Docket 29592. On October 5, 1962, the District Court, in Findings of Fact, Conclusions of Law and Decree, re-

ported at 211 F. Supp. 881, enjoined the defendant companies from failing to comply with Section 5(1) by putting into effect the Amendment to Uniform Service Contract executed on September 11, 1962, without prior approval of the Commission, but provided that nothing in these findings, conclusions or decree should be deemed to preclude the Interstate Commerce Commission from deciding that its outstanding orders in its Docket 29592 would not be violated by the defendant companies' Amendment to Uniform Service Contract executed September 11, 1962, or that its specific approval in connection with said Amendment under Section 5(1) was not required. In its decree, the District Court also provided for the automatic expiration of its injunction against the defendant companies should the Commission decide that its outstanding orders had not been violated or that its specific approval of the defendants' Amendment was not required or if the Commission specifically approved the Amendment or the pooling resulting therefrom.

The Pennsylvania Railroad Company thereupon, on October 15, 1962, repaired to the Interstate Commerce Commission petitioning for a declaratory order that the proposed arrangement for withdrawing from the Pullman Company the performance of certain sleeping car services on petitioner's lines was—

> "not violative or otherwise in disobedience of any Orders of the Commission heretofore entered in the above-entitled proceedings;
>
> "(b) not a new or changed arrangement for the pooling or division of earnings and service requiring the approval of the Commission in accordance with Section 5(1) of the Act; and
>
> "(c) clearly contemplated by Orders heretofore entered by the Commission in the above-entitled proceeding,"

and on January 16, 1964, the Commission entered its Order

(here under attack) which found that Pennsylvania's proposal and its contract of September 11, 1962, with Pullman do not violate the Commission's outstanding orders in Docket 29592 and do not require the Commission's specific approval under Section 5(1) of the Interstate Commerce Act.

Plaintiffs argue that Pennsylvania's proposed modification of the contract—withdrawing from Pullman the performance of certain sleeping car services on its lines—is a new and changed arrangement for pooling which requires the approval of the Commission in accordance with Section 5(1) of the Act, although they concede that the Commission would lack jurisdiction in the case of a railroad's complete withdrawal from a pooling arrangement.

The record before this court establishes that from the outset it was the design and intent that railroad members of the pooling arrangement should have the right to withdraw therefrom partially—that is, to withdraw from Pullman the performance of specified services and to perform those services itself.

In its 1943 opinion, the court in the antitrust case (50 F. Supp. 123), after finding that the Pullman companies had violated the antitrust laws, said:

> "Among the matters in the mind of the Court which it deems relevant for inclusion in a proposed decree are the following:
>
> • • • • •
>
> "4. The right of any railroad which wishes to operate all or a portion of its own sleeping car business so to do, regardless of existing sleeping car contracts with the Pullman Company."

In paragraph 23 of its Final Judgment entered in the antitrust case on May 8, 1944, the District Court provided that—

"Pullman, as long as it continues in the sleeping car business, shall offer upon reasonable and non-discriminatory terms to service, or furnish and service, and, if a contract providing therefor is made with such railroad, shall service, or furnish and service, sleeping cars on any line of any railroad at the request of such railroad, to the extent that cars are available, even though sleeping cars are about to be or are being furnished, serviced, or furnished and serviced, on other lines of the same railroad by the railroad itself or by some third party."

and paragraph 26 of that Final Judgment provided—

"Pullman shall not agree upon, insert in any contract, or enforce any so-called 'Exclusive Right' clause, or any similar provision, which shall give or purport to give to Pullman the exclusive right to furnish, service, or furnish and service, all of the sleeping cars on any railroad, or all of the sleeping car service of any particular type on any railroad, or which shall require that the railroad deal only with Pullman in the matter of furnishing, servicing, or furnishing and servicing, sleeping cars. Any clause in any existing contract between Pullman and any railroad which purports to grant such exclusive or similar right to Pullman is hereby declared to be and is henceforth unlawful, void and of no effect."

Turning to the original pooling agreement which was approved by the Commission back in 1947: One of its general purposes, as set forth therein, was to afford a means whereby every railroad, subject to the terms of that agreement, might—

(a) acquire all or any part of the sleeping cars regularly assigned to its lines;

(b) conduct its own sleeping car operation, in whole or in part, or arrange, through contract, on reasonable and non-discriminatory terms, for the conduct thereof by others;

(c) perform its own service or maintenance, or

service and maintenance, of sleeping cars used in operations on its lines;

(d) procure such service or maintenance, or service and maintenance, through contract on reasonable and non-discriminatory terms with The Pullman Company under railroad ownership or with a service company constituted as thereinafter set forth.

Following our historical thread, we come to the Uniform Service Contract—which was approved by the Commission—and specifically to Section 2 thereof which in unambiguous language provides that during the term of the contract Pullman shall furnish sleeping car service on the lines of the railroad, as thereinafter specified, and that in case the railroad at any time desires to furnish part of such service in connection with its sleeping car operations, and shall request Pullman to furnish a partial form of sleeping car service on lines of the railroad, Pullman shall furnish such partial service on reasonable and non-discriminatory terms. Section 2 concludes with the language: "and this contract shall be subject to such modification as may, in the particular case, be necessary to provide reasonable and non-discriminatory terms therefor."

In the Order here under attack, the Commission, after reciting that it had considered the record in Docket No. 29592, and after specifically referring to the original (1947) pooling agreement (which the Commission had approved) and also to the supplemental and revised pooling agreement of 1949 and the accompanying Uniform Service Contract (both of which had also been approved by the Commission) quoted not only Section 2 of the Contract but also Section 14(a) thereof which reads, "Nothing in this contract shall be construed as giving to Pullman an exclusive right to furnish sleeping cars or sleeping car service on Lines of the Railroad."

The court finds that Pennsylvania's proposed modifica-

tion of the Uniform Service Contract constituted a partial withdrawal—a withdrawal *pro tanto*—from the pooling arrangement; that it was not a new or changed arrangement for pooling, and did not require the approval of the Commission under Section 5(1) of the Act.

Plaintiffs here assert that the Commission's Order of January 16, 1964 should be set aside because plaintiff ORC &B was not afforded an opportunity to offer evidence in support of its position in a hearing for that purpose. It appears that one of the things that ORC&B wanted to offer in evidence before the Commission was the collective bargaining agreement between Pullman and ORC&B. In this court, plaintiff ORC&B contends that the Commission should have imposed upon Pennsylvania and Pullman conditions to its approval of their modifications of the Contract which would have protected the Pullman conductors from job loss or compensated them therefor; that if the proposed modifications of the Uniform Service Contract amount to a changed pooling arrangement, then the Pullman employees are entitled not only to have the carriers request the Commission's approval of the changed pooling arrangements but also are entitled to have the Commission attach employee-protective conditions thereto.

It is interesting to note, from an examination of the record before the court, that in the proceedings before the Commission in 1947, the Order of Railway Conductors of America (predecessor of plaintiff ORC&B in this suit) advanced a similar argument for we find that in its Report made at that time the Commission said—

> "The intervener, Order of Railway Conductors of America, upon oral argument expressed concern over the possible effect on Pullman employees, particularly those who are members of its organizations, of changes in the method of conducting the sleeping-car business which may result as a consequence of the decision of the district court in the antitrust suit. It urges that,

> as a condition of our approval of the pooling application, we require an arrangement to protect the interests of those employees with respect to their employment,"

and then observed,

> "Moreover, this intervener's chief concern appears to be due to the possibility that a considerable number of railroads might exercise their right to perform a part of their sleeping-car service outside of the pooling plan, without employing the present Pullman conductors. This right was specifically safeguarded in the orders of the district court, presumably to keep Pullman from having a monopoly in the furnishing and servicing of sleeping cars, which the Department of Justice fears. We have no power to impose a restriction upon the exercise of that right for the purpose of protecting the employment rights of Pullman employees who might be affected. As shown in appendix B, the district court's order of January 4, 1946, was 'made without prejudice to the rights of the employees of the Pullman Company under existing contracts and practices.' Those rights will not be impaired by our approval of the pooling plan."

Concerning the hearing sought by ORC&B to introduce in evidence, among other things, the collective bargaining agreement between Pullman and ORC&B, the Commission's Order under attack said, "but no allegations having been made that an abridgment of such pact, or of the Pullman employees' rights thereunder, would result from our continued approval of the present pooling agreement or from the current proposal of the Pennsylvania Railroad Company and its implementing contract, and it appearing that no such abridgment would so result, the said labor agreement is not here relevant and a hearing for its presentation in evidence herein is not necessary."

As the defendants here have pointed out, although the decree and the Commission's approval of the Pullman pool clearly provided for changes in the prior Pullman business

practices with its customers, both the court and the Commission left in full operation the collective bargaining agreements of Pullman. The provisions of these agreements covering a reduction in forces or changes in working rules or conditions by Pullman, even though the reduction or changes might be related to an exercise of a railroad option to select the service to be performed by Pullman, continue to be operative, and the mandatory procedures of the Railway Labor Act for resolving disputes under the agreements or arising from changes in such agreements are applicable and available.

In its Order of January 16, 1964, the Commission said—

> ". . . no material changes in circumstances affecting railroad sleeping car service have been brought to our attention as being wrought by the Pennsylvania Railroad Company's proposal or otherwise, as to warrant a hearing for the purposes of reviewing the propriety of our continued approval of the said pooling agreement and of issuing a supplemental order regarding the terms and conditions of such continuing approval."

The court finds that the Commission had a sufficient basis in the record and in its previous orders on which to base the Order under attack and that a further hearing for the presentation of evidence was not required (a) concerning the Commission's continued approval of the pooling agreement and its adherence to its earlier decisions which did not require the imposition of protective labor conditions or (b) concerning the proposed arrangement by Pennsylvania for partial sleeping car service.

The court finds that the Commission's Order of January 16, 1964 is consistent with the Commission's prior, outstanding orders in Docket 29592; that it is consistent with the decrees of court in the antitrust proceedings which ante-

dated and resulted in the Commission's Docket 29592; and that it is consistent with and conforms to Section 2 of the Uniform Service Contract.

This court concludes that the Commission's Findings, Conclusions, and Order dated January 16, 1964, herein sought to be set aside, are not illegal, arbitrary, or capricious, as contended by plaintiffs, and that the said Order is rational, is in accord with applicable law and is based upon sufficient findings which are supported by substantial evidence of record.

The Commission's Order of January 16, 1964, was proper.

The relief prayed for by plaintiffs should be denied and the complaint should be dismissed.

LUTHER M. SWYGERT,
Circuit Judge.

ABRAHAM L. MAROWITZ,
District Judge.

Dated: Chicago, Illinois,
November 30, 1966.

APPENDIX A-1.

PERRY, *District Judge* (dissenting):

I must dissent from the majority opinion in this case.

In my opinion, both the Commission and the defendants here lean too heavily upon Section 2 of the Uniform Service Contract which was approved by the Commission. That Section provides that a railroad, which itself desires to furnish part of the service in connection with its sleeping car operations, may request that Pullman furnish a partial form of sleeping car service on lines of the railroad, whereupon Pullman shall furnish such partial service on reasonable and non-discriminatory terms. The concluding clause of the Section, however,—which provides that the contract shall be subject to such modification as may, in a particular case, be necessary to provide reasonable and non-discriminatory terms therefor—has been read by defendants to permit, ad infinitum, future contract modifications, and all without obtaining the prior approval of the Commission, apparently on the ground that Commission approval of the Uniform Service Contract is approval of such future modifications.

It appears to me that when the Commission undertook to interpret the law and the meaning and effect of the Contract here involved, arriving at its determination that no hearing was necessary, it encroached upon a function reserved to the courts.

It is my view that the proposed modification here under consideration constituted not a partial withdrawal from the pooling arrangement but a complete change and modification thereof which, under Section 5(1) required a hearing

by the Commission and the taking of further evidence; that the Commission, an arm of the government and composed of members skilled as experts in all of the ramifications of transportation—technical, economic and social—failed to carry out the duty for which it was specifically created when it failed to hold such a hearing and to take evidence.

It is my further view that should the Commission approve the Pennsylvania's proposed change or modification of the Uniform Service Contract (following the hearing required under Section 5(1) of the Act), that approval should certainly be conditioned on provisions to insure employee-protection. Otherwise, the involved Pullman employees could have no assurance of employment security even though their union be a party to a collective bargaining agreement on their behalf.

It was brought out in oral argument that about 53 Pullman conductors would lose their jobs under Pennsylvania's proposed arrangement in the instant case. In all likelihood, however, other railroad members of the pool will follow Pennsylvania's lead, in which event more than 600 Pullman employees will be jobless, engendering serious social and economic problems for a considerable segment of the employable public. Viewing the matter in a practical light, a large number of these employees are men who are not actually old but are too old to acquire other skills and too old to be absorbed by industrial concerns whose pension plan set-ups do not allow for the employment of, shall we say, more mature people. In their employment by Pullman over the years, these men have acquired seniority rights and they have moved closer to their day of retirement when they could expect the security of a pension which they have earned.

The Commission's determination, in the instant case, to dispense with the hearing could be that small hole in the

dike which, as it widens, may well affect the employment status and rights of untold numbers of other employees; may well have an impact on the railroads themselves in employer-employee relations and, finally, in the chain of events, may affect the public in the quality of the service rendered it.

Granted that the Commission has a heavy caseload and that a hearing on the instant matter could be time-consuming, and granted also that the problem of the plight of these Pullman employees is a thorny one, it is the responsibility and duty of the Commission to grasp the "thorny" thistle, to hold hearings, to take evidence and then to make its ruling.

I cannot lose sight of the fact that all of Pullman's stock is owned by the railroad-members of the pooling agreement and that Pennsylvania, which owns more than 118,000 shares of that stock, is one of the controlling shareholders. The proposed change or modification of the contract was not arrived at by two independent contracting parties, both sui juris. For all practical purposes, the agreement is a unilateral one, the terms of which were dictated by Pennsylvania. Pullman has been cast in the role of a mere puppet, with no volition of its own, and has been placed in a position of breaching its contract with ORC&B which, in turn, is left with no recourse because Pullman is simply going out of the business of employing members of ORC&B as and whenever Pennsylvania pulls the controlling strings.

It is a skillful legal maneuver by which the Pennsylvania in this case, and eventually all of the other Pullman stock-owning railroads, may breach with impunity to themselves and to Pullman the collective bargaining agreement between Pullman and ORC&B, and have the benefits of the Commission's approval of the pool, otherwise contrary to law—taking only the sweets and rejecting the bitters of the arrangement.

The Commission exceeded its authority when it failed to restrict itself to its field of expertise and when it refused to hold the hearing, sought by ORC&B, at which evidence might have been introduced to determine whether the new arrangement would be in the interest of better service to the public or of economy in operation.

I would remand the cause to the Commission for a hearing and the taking of evidence.

J. S. PERRY,
United States District Judge.

Dated: Chicago, Illinois,
November 30, 1966.

APPENDIX B.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, etc., et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants,
No. 64 C 1401.

JUDGMENT ORDER.

This cause came on to be heard before this court, constituted as a three-judge district court, on plaintiffs' complaint to enjoin and set aside an order of the Interstate Commerce Commission entered January 16, 1964, in Docket No. 29592 entitled, "Proposed Pooling of Railroad Earnings and Service Involved in Operation of The Pullman Company under Railroad Ownership".

The court has considered the complaint herein, together with the answers of defendants thereto; has heard arguments of counsel and has considered said arguments and the briefs of counsel; has examined and considered the record compiled and submitted on stipulation of the parties and received in evidence; and this day has made and filed its Memorandum Opinion herein.

It appears that Count II of the Complaint in this cause presents issues which are not properly cognizable by this statutory three-judge court and should therefore be severed, leaving only Count I for consideration by this court.

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED and DECREED—

1. That Count II of the Complaint herein be and it is hereby severed, the issues therein presented to be considered by the District Court.

2. That the relief prayed for by plaintiffs be and it is hereby denied and that the Complaint (Count I) be and it is hereby dismissed on the merits.

Enter:

LUTHER M. SWYGERT,
United States Circuit Judge,
ABRAHAM L. MAROVITZ,
United States District Judge,
J. S. PERRY,
United States District Judge.

Dated: Chicago, Illinois,
November 30, 1966.

APPENDIX C.

Served Feb. 5, 1964.

INTERSTATE COMMERCE COMMISSION.

No. 29592

PROPOSED POOLING OF RAILROAD EARNINGS AND SERVICE INVOLVED IN OPERATION OF THE PULLMAN COMPANY UNDER RAILROAD OWNERSHIP.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 16th day of January A. D. 1964.

No. 29592.

Proposed Pooling of Railroad Earnings and Service Involved in Operation of the Pullman Company Under Railroad Ownership.

Upon consideration of the record in the above-entitled proceeding, including the petition of The Pennsylvania Railroad Company for an order finding and declaring that a proposed arrangement for the performance of partial sleeping car service by The Pullman Company (Pullman) would not be in disobedience or violation of outstanding orders in said proceeding, does not require specific approval of this Commission under section 5(1) of the Interstate Commerce Act and is clearly contemplated by said outstanding orders; the motion in support of the petition

filed by the Atlantic Coast Line Railroad Company for itself and by the Louisville and Nashville Railroad Company, as agent for the Georgia Railroad; and the reply and resistance to said petition filed by the Order of Railway Conductors and Brakemen; and after hearing the said parties in oral argument; and

It appearing, That the original pooling agreement approved by this Commission in 268 I. C. C. 473 (1947), set forth the purposes of the buying group of railroads in buying the stock of Pullman, among which were: to afford a means whereby every railroad subject to the terms of the agreement may conduct its own sleeping car operation, in whole or in part; or perform its own service or maintenance, or service and maintenance of sleeping cars used in operations on its lines; or procure such service or maintenance, or service and maintenance through contract with Pullman; to reduce Pullman into a sleeping car service corporation which would terminate the then existing operating contracts and would offer a contract to perform the so-called hotel servicing (covering the providing of employees, linen, laundry service, etc.), and contracts to supply certain sleeping cars and to maintain sleeping car equipment owned by a railroad, as might be desired by a railroad; and

It further appearing, That to carry out these and the other purposes set forth therein the said agreement provided *inter alia,* that Pullman will service for any railroad contracting therefor, sleeping cars owned by or leased to Pullman, and provided separately and in addition, that Pullman also will maintain for any railroad contracting therefor, sleeping cars owned by such railroad whether or not serviced by Pullman; and

It further appearing, That in its report on further hearing, 276 I. C. C. 5 (1949), the Commission approved a supplemental and revised pooling agreement, and an ac-

companying Uniform Service Contract for use between Pullman and each of the railroads, contemplating a continuation of the several factors making up the previously approved pooling arrangement, namely, Pullman's providing of employees, service and maintenance for sleeping cars, and of certain services regarding fares, and Pullman's responsibility for the safety and comfort of sleeping car passengers; but providing a change in the method of ascertaining and allocating Pullman's operating expenses and in the basis of compensation to be received by Pullman;

It further appearing, That, among the terms of the said Uniform Service Contract are the provisions that:

Sec. 2 [concerning the Scope of Contract] During the term of this contract Pullman shall furnish sleeping car service on the Lines of the Railroad, as hereinafter specified. In case the Railroad at any time desires to furnish part of such service in connection with its sleeping car operations, and shall request Pullman to furnish a partial form of sleeping car service on Lines of the Railroad, Pullman shall furnish such partial service on reasonable and nondiscriminatory terms; and this contract shall be subject to such modification as may, in the particular case, be necessary to provide reasonable and nondiscriminatory terms therefor.

and,

Sec. 14 (a) [among the Rules for Interpretation of Contract] Nothing in this contract shall be construed as giving to Pullman an exclusive right to furnish sleeping cars or sleeping car service on Lines of the Railroad;

It further appearing, That by letter dated May 29, 1962, the Pennsylvania Railroad Company, in accordance with section 2 of the Uniform Service Contract, requested Pullman to furnish partial sleeping car service consisting, in general, of all services on joint lines as previously ren-

dered, and on its local lines, of furnishing, maintaining, equipping and supplying sleeping cars and performing shop and yard repairs and interior cleaning; and that by contract dated September 11, 1962, the said Railroad and Pullman implemented the said request by specifying the particular functions Pullman would continue to perform in that Railroad's local sleeping car operations, and providing that Pullman would not receive revenues, payments or credits for such services as Pullman would no longer perform; the terms of the said letter and implementing contract being fully described in the said Railroad's petition herein; and

It further appearing, That the Pennsylvania Railroad Company's proposed plan for local and joint sleeping car service on its lines and its said contract of September 11, 1962, with the Pullman Company are fully contemplated by the terms of the pooling agreement and Uniform Service Contract approved by this Commission in the several prior reports on this proceeding, and are not inconsistent therewith;

It further appearing, That no material changes in circumstances affecting railroad sleeping car service have been brought to our attention as being wrought by the Pennsylvania Railroad Company's proposal or otherwise, as to warrant a hearing for the purposes of reviewing the propriety of our continued approval of the said pooling agreement and of issuing a supplemental order regarding the terms and conditions of such continuing approval;

And it further appearing, That the Order of Railway Conductors and Bakemen (ORC&B) have sought a hearing to introduce in evidence, among other things, the collective bargaining pact between Pullman and ORC&B; but no allegations having been made that an abridgement of such pact, or of the Pullman employees' rights thereupon, would

result from our continued approval of the present pooling agreement or from the current proposal of the Pennsylvania Railroad Company and its implementing contract, and it appearing that no such abridgement would so result, the said labor agreement is not here relevant and a hearing for its presentation in evidence herein is not necessary; wherefore

We find, That The Pennsylvania Railroad Company's proposal and its contract of September 11, 1962, with The Pullman Company, do not violate the outstanding orders in this proceeding and do not require our specific approval.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(Seal)

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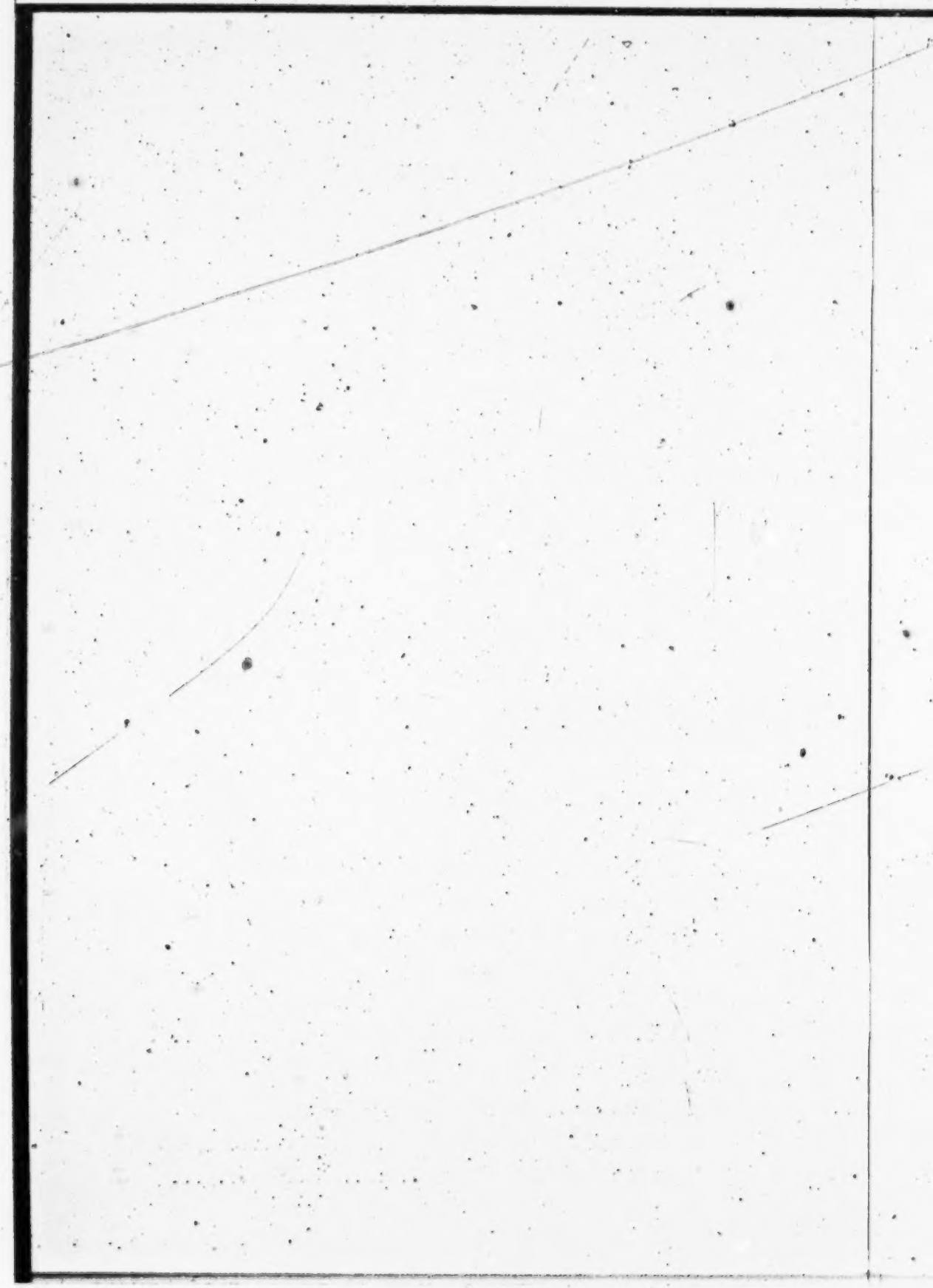
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1093

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*

On Appeal from the United States District Court for the Northern District of Illinois

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, The Pennsylvania Railroad Company, Appellee, moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court[1] dismissing Appellants' complaint brought to set aside an order of the Interstate Commerce Commission.[2] The Commission's order which is declaratory in form found that Pennsylvania's plan to

[1] *Order of Railway Conductors and Brakemen v. United States*, 263 F. Supp. 650, decided November 30, 1966, and set forth at pp. i to xvii of the appendix to the Jurisdictional Statement.

[2] *Pooling of Railroad Earnings and Service, Pullman Co.*, 322 I.C.C. 100 (1964), set forth at pp. xx to xxiv of the appendix to the Jurisdictional Statement.

withdraw *pro tanto* from a railroad pooling arrangement for sleeping car operations would be consistent with and fully contemplated by the terms of the pooling as previously approved by the Commission, pursuant to Section 5(1) of the Interstate Commerce Act, in *Pooling of Railroad Earnings and Service, Pullman Co.*, 268 I.C.C. 473 (1947) and 276 I.C.C. 5 (1949). The district court concluded that the challenged finding by the Commission is "in accord with applicable law and . . . supported by substantial evidence of record." Its opinion noted:

> "The record before this court establishes that from the outset it was the design and intent that railroad members of the pooling arrangement should have the right to withdraw therefrom partially—that is, to withdraw from Pullman the performance of specified services and to perform those services itself." (263 F. Supp. 650, 654)

The record referred to by the Court below included not only the Commission proceedings which began in 1946, but also the antitrust case of *United States* v. *Pullman Company*, 50 F. Supp. 123 (1943) 53 F. Supp. 908 (1944), 64 F. Supp. 108 (1946), affirmed by an equally divided Court at 330 U.S. 806, rehearing denied, 331 U.S. 865 (1947).

In 1940 the United States initiated an antitrust proceeding in the District Court for the Eastern District of Pennsylvania against Pullman Incorporated and its subsidiaries, Pullman Standard Car Manufacturing Company and The Pullman Company. That court concluded that an unlawful monopoly existed in the business of manufacturing sleeping cars and of servicing and maintaining sleeping cars. It ordered the parent company to divest itself of either the manufacturing subsidiary or the service subsidiary, and ultimately approved sale of the latter (The Pullman Company) to the sleeping car railroads.

Since the court regarded those railroads as the principal victims of the monopoly involved, it was at pains to assure them maximum flexibility in future dealings with Pullman and to prevent Pullman from retaining any anti-competitive powers over the sleeping car business. The desired flexibility was to be achieved largely by assuring for the future that each railroad would have the right to withdraw wholly or partially from any contract with Pullman, as to which the court acted as follows:

1. In 50 F. Supp. 123 at page 137, it stated that its decree would be framed so as to assure "the right of any railroad which wishes to operate all or a portion of its own sleeping car business so to do," and to achieve "the elimination of exclusive dealing contracts between the Pullman Company and the railroads."

2. In its unreported judgment entered May 8, 1944, the court adopted orders requiring Pullman to offer so-called "partial operation" to the railroads and prohibiting Pullman from having or enforcing any exclusive right clause in future contracts which would require railroads to "deal only with Pullman in the matter of furnishing, servicing, or furnishing and servicing, sleeping cars."

3. In 64 F. Supp. 108 at page 112, the court stated that the unlawful monopoly could not recur with Pullman under railroad ownership because the continuing orders of the court, while allowing a railroad to "use exclusively the services of Pullman", would also provide that the railroad could "do part of that service itself . . . and ask Pullman to do the rest."

These actions by the antitrust court in the *Pullman* case were all before the Commission when the sleeping car railroads in 1946 applied for specific approval under Section 5(1) of a pooling of railroad earnings and service in

sleeping car operations through the instrumentality of Pullman. In addition, however, the right of a railroad at any time to take over and perform itself either the servicing of sleeping cars or the maintenance of sleeping cars was made expressly a part of the pooling arrangement both in the initial and in all subsequent proceedings before the Commission.

A Memorandum Agreement of October 18, 1945, among the applicant railroads set forth the basic terms of the proposed pool. It expressly reserved to each railroad member of the pool the right to "perform its own service or maintenance, or service and maintenance." It also provided that Pullman could be required to maintain sleeping cars for a railroad "whether or not leased to or serviced by The Pullman Company"—which is a precise description of what Pennsylvania has requested Pullman to do. In the Commission order here on appeal, the Memorandum Agreement of 1945 is referred to as "the original pooling agreement approved by this Commission." (322 I.C.C. 100)

In its 1949 proceeding on the sleeping car pool, reported at 276 I.C.C. 5, the Commission approved a revision of the agreement and a Uniform Service Contract to govern the respective rights and duties of each railroad and Pullman. That Contract again expressly required Pullman at the request of any railroad "to furnish a partial form of sleeping car service," and provided that Pullman would have no exclusive right either to furnish cars or to service cars. (322 I.C.C. 100)

Exercising its right thus accorded by the contract to request a partial form of service from Pullman, Pennsylvania notified Pullman in 1962 that on its local sleeping car lines Pullman would thereafter furnish and maintain the cars while Pennsylvania itself would service them. Appellant ORC&B obtained an injunction against this arrangement pending a determination by the Commission in *Brogan* v. *Pennsylvania Railroad Company*, 211 F. Supp.

881 (1962). This forced Pennsylvania to petition the Commission for a declaratory order. The order here on appeal was issued pursuant to that petition.

Although conductors employed by Pullman are complete strangers to the pooling agreements and arrangements as such, the right of Pennsylvania to withdraw as it seeks to do has thus been litigated by Appellants for the purpose of protecting the interests of such conductors. In December, 1963, Pennsylvania entered into an agreement with Appellant ORC&B which provides severance allowances or other protective payments to Pullman conductors who lose their jobs as a result of this withdrawal from the sleeping car pool. This agreement would be applicable to the proposed arrangement involved in this appeal.

The finding of the Commission sustained by the court below is to the effect that Pennsylvania is clearly entitled to exercise its rights under the approved pooling arrangement and that no application for specific approval of its request is required by Section 5(1) of the Act.

ARGUMENT

The decision below is plainly correct and this appeal presents no question warranting plenary review by this Court.

I. Appellants' efforts to delay and to deny Pennsylvania's right to withdraw partially from the Pullman pool are ultimately founded on semantics rather than substance. They insist that partial withdrawal by Pennsylvania will change, alter and amend the approved pooling arrangement, and must therefore be specifically approved by the Commission upon application and hearing under Section 5(1) of the Act. Admittedly a revision of an approved pooling arrangement requires Commission approval (*Pooling of Railroad Earnings and Service, Pullman Co.*, 306 I.C.C. 138, 140), but Appellants ignore the plain fact that

the type of *pro tanto* withdrawal sought by Pennsylvania has always been a part of the arrangement as consistently approved by the Commission. Thus, what Pennsylvania seeks to do is not a change or revision of the authorized pooling in any legally significant sense.

II. The Appellants attack the Commission order under review on the ground that they were denied a "hearing." This contention ignores the fact that the order is interpretive in character and does not constitute a grant of approval under Section 5(1) for the partial withdrawal by Pennsylvania from the pool. Thus, the order rests upon the extensive record made throughout the pooling case since 1946 and there was no need for an evidentiary hearing on Pennsylvania's petition.

III. Appellants or their predecessors in interest participated in the anti-trust case against Pullman and in the original Commission proceedings on the pooling here involved. They contended then against the right of any railroad to withdraw from the Pullman arrangement, presented all of the arguments they do now, but failed to persuade the court or the Commission to their point of view. In response to the Union's requests for job security, the antitrust court merely preserved "the rights of the employes of the Pullman Company under existing contracts and practices." *Pullman, supra,* 64 F. Supp. 108, 114 (1946). The Commission likewise found that it could not impose a restriction on the right of withdrawal from the pool "for the purpose of protecting the employment rights of Pullman employees who might be affected" (268 I.C.C. 473, 492). Thus the basic question presented on this appeal was presented and decided upwards of 20 years ago, without further action by Appellants.

IV. Repeated assertions by Appellants, that the Commission and the railroads have always given assurances that no Pullman conductors would be affected by railroad

withdrawals from the pool, are without any support in the record. The only assurance given by the railroads, and recognized by the Commission, was that Pullman would continue to be bound by its labor agreements and practices after its stock was acquired by the carriers (268 I.C.C. 473, 491). Furthermore, the care exercised by the antitrust court in the *Pullman* case and later by the Commission throughout the pooling proceedings, to assure each railroad at all times the unrestricted right to withdraw in whole or in part from any contract with Pullman, is plainly irreconcilable with the guarantee of employment security to Pullman employes which Appellants contend was given. Moreover, as previously stated, Pennsylvania has since agreed to make specified payments to Pullman conductors who lose their jobs through the proposed arrangement.

V. A pooling arrangement is inherently anti-competitive in nature, and antitrust statutes condone such arrangements only under special circumstances and, as in Section 5(1) of the Act, with specific regulatory supervision. Such special handling, however, applies only to the initiation of a pool. It has no place in the reverse situation, namely, when a member of the pooling group seeks to withdraw in whole or in part. Here antitrust policy is entirely different. It seeks to preserve and encourage the right of withdrawal or, as it is sometimes called, the right of independent action.[1] What Appellants seek here would plainly frustrate such policy. If, as Appellants contend, Pennsylvania must obtain the specific approval of the Commission under Section 5(1) of the Act before effecting

[1] Congress has expressly articulated this policy in subsection (6) of Section 5a of the Interstate Commerce Act, 49 U.S.C. 5a, in according railroad parties to rate conference agreements, approved by the Commission, "the free and unrestrained right to take independent action."

a partial withdrawal, the required procedures could completely nullify this exercise of the right of independent action. Section 5(1) requires the assent of all railroad participants to any new or revised pooling arrangement. The failure of one railroad in the sleeping car pool to give such consent—for any reason or no reason—would require denial of Pennsylvania's application. If the contentions of Appellants were sustained, each member of the anti-competitive pooling arrangement would hold an absolute veto over the exercise of the right by any other member to partially withdraw from it. That result would, accordingly, frustrate a basic antitrust policy in anti-competitive arrangements such as the sleeping car pool.

CONCLUSION

Since this appeal presents no issue of such substance as to require further argument, the judgment of the court below should be affirmed by the granting of this motion.

Respectfully submitted,

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Chicago, Illinois 60606

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Counsel for Appellee,
The Pennsylvania Railroad Company

PROOF OF SERVICE

I, David L. Wilson, Attorney for Appellee, The Pennsylvania Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of April, 1967, I served copies of the foregoing Motion to Affirm on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellants, copies to their attorneys, Harry Wilmarth, Esq., 1120 Merchants National Bank Building, Cedar Rapids, Iowa, and Burke Williamson, Esq., 29 South LaSalle Street, Chicago, Illinois.

2. On the Appellee, United States of America, copies to the Honorable Ramsey Clark, Attorney General of the United States, Department of Justice, Washington, D. C., the Honorable Thurgood Marshall, Solicitor General, Department of Justice, Washington, D. C., the Honorable Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C., and Edward V. Hanrahan, Esq., United States Attorney, 219 South Dearborn Street, Chicago, Illinois.

3. On the Appellee, Interstate Commerce Commission, copies to the Honorable Robert W. Ginnane, its General Counsel, and Mrs. Betty Jo Christian, Esq., its Attorney.

4. On the Appellee, The Pullman Company, copies to its attorneys, Martin J. Rock, Esq., 165 North Canal Street, Chicago, Illinois, and Howard P. Robinson, Esq., 11 South LaSalle Street, Chicago, Illinois.

DAVID L. WILSON

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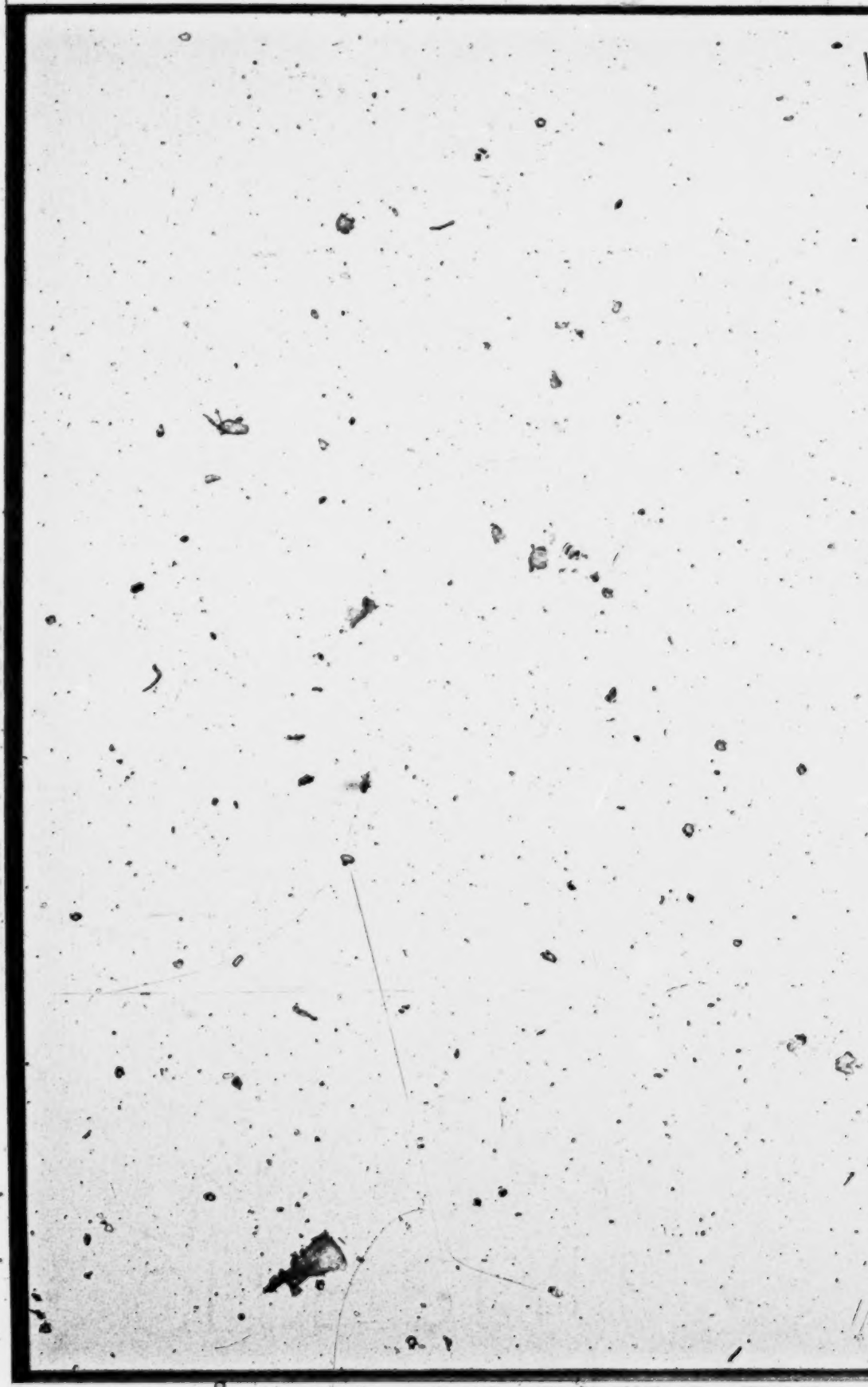
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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1093

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. xviii-xix) dismiss-

ing appellants' suit to set aside the Interstate Commerce Commission's order in *Proposed Pooling of Railroad Earnings and Service Involved in Operation of the Pullman Company Under Railroad Ownership*, 322 I.C.C. 100 (J.S. xx-xxiv).

The case is an outgrowth of a civil antitrust proceeding brought by the United States in 1940 against the Pullman Company (*United States* v. *Pullman Co.*, 50 F. Supp. 123, 53 F. Supp. 908, 64 F. Supp. 108 (E. D. Pa.), affirmed by an equally divided Court, 330 U.S. 806). In concluding that Pullman had violated Section 2 of the Sherman Act, the district court found that it had acquired a monopoly of both the manufacture and the servicing of sleeping cars, and, by its insistence on "all or nothing clauses" in its contracts with the railroads, had made it virtually impossible for anyone else to enter the business. This exclusion applied "not only to a competing concessionaire, but even to a railroad which sought to run part of its own sleeping car service and let Pullman do the rest" (64 F. Supp. at 112; see also, 50 F. Supp. at 134). The judgment required Pullman to divest itself of either its sleeping car manufacturing or its servicing business and to recognize "the right of any railroad which wishes to operate all or a portion of its own sleeping car business so to do," and directed the "elimination of exclusive dealing contracts between the Pullman Company and the railroads" (50 F. Supp. at 137).

To comply with the judgment Pullman decided to sell the servicing business to a group of 56 railroads

while retaining the manufacturing business. In approving the sale, the district court repeated that "the restrictions imposed by the [prior] judgment upon the Pullman Company are still to be effective" (64 F. Supp. at 110). Responding to the questions raised by the Order of Railway Conductors (appellant's predecessor) concerning the effect of the decree upon the rights of Pullman conductors, the district court ruled that its "order is made without prejudice to the rights of the employees of the Pullman Company under existing contracts and practices" (64 F. Supp. at 114).

The railroads applied to the Interstate Commerce Commission for approval under Section 5(1) of the Interstate Commerce Act, 49 U.S.C. 5(1), of their plan for a pooling of the sleeping car servicing business. *Proposed Pooling of Railroad Earnings and Service Involved in Operation of the Pullman Company Under Railroad Ownership*, 268 I.C.C. 473, 276 I.C.C. 5, 294 I.C.C. 703, 306 I.C.C. 138. The general purpose, as stated in a memorandum agreement submitted to the Commission, was to provide a means by which every railroad might:

(a) acquire all or any part of the sleeping cars regularly assigned to its lines;

(b) conduct its own sleeping car operation, in whole or in part, or arrange, through contract, on reasonable and non-discriminatory terms, for the conduct thereof by others;

(c) perform its own service or maintenance, or service and maintenance, of sleeping cars used in operations on its lines;

(d) procure such service or maintenance, or service and maintenance, through contract on reasonable and non-discriminatory terms with The Pullman Company under railroad ownership or with a service company constituted as hereinafter set forth.

The Order of Railway Conductors intervened in that proceeding, urging that employee protective conditions be imposed as a condition of the Commission's approval of the pooling plan. The Commission declined to impose such conditions. It noted that the union's "chief concern appears to be due to the possibility that a considerable number of railroads might exercise their right to perform a part of their sleeping car service * * *, [which] right was specifically safeguarded in the orders of the district court * * *" (268 I.C.C. at 491). The Commission accordingly ruled that it would not "impose a restriction upon the exercise of that right for the purpose of protecting the employment rights of Pullman employees who might be affected" (268 I.C.C. at 491-492), and approved the pooling plan as submitted. Neither the union nor any other party sought judicial review of the Commission's decision. Subsequently, the Commission approved (276 I.C.C. 5) a Uniform Service Contract, Section 2 of which specifically provided for implementation of a railroad's right to perform part of its own service [1] (J.S. xxii).

[1] "* * * In case the Railroad at any time desires to furnish part of such service in connection with its sleeping car operations, and shall request Pullman to furnish a partial form

The right was first exercised by the New York Central Railroad, which in 1959 decided to discontinue all Pullman service on its own lines. The union thereupon filed a petition with the Commission seeking a reopening of the pooling proceedings to reconsider employee protective conditions. The Commission refused, stating that its prior order "clearly contemplated that railroads may withdraw from Pullman the performance of any proposed services and themselves perform those services" (306 I.C.C. 138, 140). Again, judicial review was not sought.

In 1962, the Pennsylvania Railroad notified Pullman that it was exercising its right to request a partial form of sleeping car service. That request was implemented by a contract specifying certain services to be performed by Pullman (such as the furnishing of linens and other supplies, yard repairs, shop repairs, and interior car cleaning), and providing that all other services—including those performed by Pullman conductors—would be provided by the Pennsylvania itself. Upon the complaint of several Pullman conductors, a one-judge district court issued an order enjoining the Pennsylvania from putting its contract into effect without the approval of the Commission. But the order also provided that it would not preclude the Commission from ruling either that the contract did not violate the Commission's prior orders or

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of sleeping car service on Lines of the Railroad, Pullman shall furnish such partial service on reasonable and non-discriminatory terms; and this contract shall be subject to such modification as may, in the particular case, be necessary to provide reasonable and non-discriminatory terms therefor."

that specific Commission approval of the contract was not required.[2] *Brogan* v. *Pennsylvania R.R. Co.*, 211 F. Supp. 881 (N.D. Ill.).

Accordingly, the Pennsylvania petitioned the Commission for a declaratory order approving the contract. The union replied and requested a hearing. The Commission, following oral argument, held that the Pennsylvania's proposal to furnish part of its own sleeping car service was "fully contemplated by the terms of the pooling agreement and Uniform Service Contract approved by this Commission in the several prior reports in this proceeding" (J.S. xxiii) and that the contract between Pennsylvania and Pullman implementing that proposal did not require specific approval by the Commission under Section 5(1) of the Act (J.S. xxiv). It also denied the union's request for a hearing, explaining that the proposal would not result in any material change in circumstances affecting railroad sleeping car service and would not abridge the collective bargaining agreement between the union and Pullman.

The court below, in a 2-1 decision, sustained the Commission's order, ruling that it was consistent with the Commission's prior outstanding orders and the decree of the court in the antitrust proceeding, and that no further hearing was required (J.S. xii).

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[2] In such event the court's order would expire 20 days after the Commission acted.

ARGUMENT

The decision of the district court is clearly correct, and the appeal presents no substantial question warranting plenary consideration by this Court.

By its order, the Commission has merely reiterated its long-standing construction of the *Pullman* antitrust case and its own prior approval of the pooling agreement as conferring upon the railroads a right to perform all or part of their own sleeping-car service. Affected employees retain all their rights under the collective bargaining agreements with their respective employers, which continue in full force and operation, and any dispute concerning the application of those agreements is subject to the mandatory provisions of the Railway Labor Act, 45 U.S.C. 151-160.

1. Appellants' basic contention (J.S. 18-19) is that a railroad cannot choose to obtain only a partial service from Pullman, but must either accept all services offered by Pullman or withdraw part or all of its lines entirely from the Pullman pool. But that would be the same type of requirements contract condemned by the antitrust decree, which expressly protects the right of a railroad "to run part of its own sleeping car service and let Pullman do the rest" (64 F. Supp. at 112). The pooling agreement, drawn in strict conformity with that decree, entitles the railroad to "request Pullman to furnish a partial form of sleeping car service" (276 I.C.C. 5), and the Pennsylvania has done no more than exercise that right.

2. The Pennsylvania's decision to perform part of its own sleeping car service itself did not require the approval of the Commission under Section 5(1) of the Act. That section,[3] we stress, is grounded in concern with the anticompetitive effects which pooling agreements frequently entail. Accordingly, it prohibits common carriers from *entering* into an agreement to pool traffic, service or earnings unless the Commission finds that the agreement "will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition."

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[3] Section 5(1), 49 U.S.C. 5(1), provides:

> Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: * * *

A carrier's *withdrawal* from a pooling agreement carries none of the dangers that the formation of such agreements pose. On the contrary, withdrawal of a carrier restores it as an independent competitor. That is doubtless why the statute does not require that the approval of the Commission be obtained before a carrier may withdraw. The court below properly found that the Pennsylvania's action "constituted a partial withdrawal—a withdrawal *pro tanto*—from the pooling arrangement; that it was not a new or changed arrangement for pooling, and did not require the approval of the Commission under Section 5(1) of the Act" (J.S. x).

There is no merit to appellants' contention that the Pennsylvania's action results in a new or changed pooling agreement within the meaning of Section 5(1) simply because the details of the partial service to be rendered by Pullman were embodied in a new agreement between the Pennsylvania and Pullman. Section 2 of the Uniform Service Contract, previously approved by the Commission, specifically provided for this contractual method of implementing the railroad's right to obtain a partial service from Pullman. Such a procedure is, moreover, a practical necessity in order to preserve a railroad's right to select which services it wishes to obtain from Pullman. More than 50 railroads are parties to the Pullman pooling plan, and Section 5(1) requires that all parties must assent to any new or changed pooling agreement. If a contract specifying the terms of the partial service to be rendered to an individual railroad were construed as a new pooling agreement to which the assent of all

the parties was required, the right to obtain such partial service would be severely impaired, contrary to the express provisions of the antitrust decree and the prior orders of the Commission.

3. Appellants, who represent Pullman's employees, may not be heard to urge (J.S. 18-19, 23) that a railroad's right to perform part of its own sleeping car service should be restricted by the imposition of protective conditions in favor of Pullman employees.[4] The union did not seek review of the Commission's determination in 1947 that the imposition of such conditions would constitute an improper restriction on the right of the railroads—specifically protected by the antitrust decree—to freely choose the services they would obtain from Pullman. Moreover, both the antitrust court and the Commission "left in full operation the collective bargaining agreements of Pullman," which cover "a reduction in forces or changes in working rules or conditions by Pullman, even though the reduction or changes might be related to an exercise of a railroad option to select the service to be performed by Pullman" (J.S. xii). Those collective bargaining agreements afford adequate protection to Pullman's employees and are in no way impaired by the Commission's order herein.[5]

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[4] Nevertheless, the Pennsylvania has entered into an agreement with Pullman to provide monetary protection for Pullman conductors who lose their jobs as a result of its election to perform part of its own sleeping car service (J.A. 1062-1067).

[5] Contrary to appellants' assertion (J.S. 22), the Commission did not purport to determine whether there has been a

4. The Commission did not abuse its discretion in denying appellants' request for an evidentiary hearing. Extensive hearings—in which the union participated—had been held prior to the Commission's approval of the Pullman pooling agreement in 1947. Finding that appellants had demonstrated "no material changes in circumstances affecting railroad sleeping car service," the Commission properly concluded that no "hearing for the purposes of reviewing the propriety of our continued approval of the said pooling agreement" was required (J.S. xxiii).

Appellants specified only two areas that they wished to explore in a hearing. First, they sought "to introduce in evidence * * * the collective bargaining pact between Pullman and ORC&B" (J.S. xxiii). But, as previously noted, the collective bargaining agreements are not affected by the Commission's order. Thus, the Commission was correct in observing that such "agreement is not here relevant and a hearing for its presentation in evidence herein is not necessary" (J.S. xxiv). Secondly, appellants claimed that the contract specifying the partial service to be rendered to the Pennsylvania by Pullman would result in a "redistribution" of Pullman revenues and expenses. To be sure, the contract must perforce elimi-

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violation of the collective bargaining agreement. On the contrary, it stressed that since its original approval of the pooling plan pursuant to the antitrust decree was "without prejudice to the rights of the employees of the Pullman Company under existing contracts and practices" (268 I.C.C. at 492), its continued approval of the same pooling plan would not abridge appellants' rights under their collective bargaining contracts (J.S. xxiii-xxiv).

nate the revenue and expense connected with the services that the Pennsylvania is no longer to obtain from Pullman, but appellants did not question before the Commission that the provisions of the contract were "reasonable and non-discriminatory," as the previously approved Uniform Operating Contract requires them to be. It is thus difficult to see what remains to be considered in an evidentiary hearing on the contract. And indeed appellants have never specified any evidence that they wished to introduce, nor indicated what their suggested analysis of accounting arrangements was expected to reveal.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1093

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, AN UNINCORPORATED ASSOCIATION; JOHN T. KENNEDY, JAMES P. PALM, AND PAUL L. WARD, INDIVIDUALLY, AND FOR ALL OTHERS SIMILARLY SITUATED,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION, AND THE PULLMAN COMPANY, A CORPORATION,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION, AND THE PULLMAN COMPANY, A CORPORATION,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

Importance of Questions.

This appeal raises the question whether common carriers may enter into a contract to modify a pooling agreement in order to effectuate a "partial withdrawal" from the pooling without obtaining Commission approval in spite of the provisions of Section 5(1) of the Interstate Commerce Act which require Commission approval of contracts for "any portion" of a pooling.

Thus this appeal raises the fundamental question of employee protection under Section 5(1) of the Act for employees displaced from employment by a "partial withdrawal" from a pooling.* Under the similar provisions of other sections of the Act relative to leases and abandonments this Court has held that the Commission had power to enter an order affording some benefits to displaced employees. This Court has not heretofore decided whether the Commission is authorized by Section 5(1) of the Act to issue a protective order for employees.

Authority of Commission With Respect to Withdrawals From Pooling Agreements Under Section 5(1) of Interstate Commerce Act.

The Commission contends that it has no statutory authority to approve or disapprove a "withdrawal" from a previously approved pooling agreement. Arguing from this premise it is urged that the Commission therefore has no authority to approve or disapprove a "partial withdrawal" or a "withdrawal *pro tanto*" or to enter a protective order for employees losing employment (Govt. Motion, pp. 8-9; Pa. Motion, pp. 6-8).

The Commission argues that Section 5(1) of the Interstate Commerce Act only prohibits common carriers from "entering" into pooling agreements without Commission approval, and that it does not impose any prohibition on discontinuance of the pooling (Govt. Motion, p. 8, Pa. Motion, p. 7). This construction of Section 5(1) was expressed by the Commission in a proceeding involving the New York Central Railroad entitled, *Pooling of Railroad*

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* The motions to affirm filed on behalf of the Interstate Commerce Commission and The Pennsylvania Railroad will be answered in a single reply. For convenience both movants will sometimes be referred to as "the Commission".

Earnings and Service, Pullman Co., 306 I. C. C. 138, 140. The Commission said:

> "While changes in pooling arrangements require approval, there is no provision which states that permission must be obtained to discontinue a pooling arrangement, . . ."

In further support of its lack of power the Commission argues that Section 5(1) is grounded in concern with the anti-competitive effects of pooling agreements, that the discontinuance of a pooling arrangement carries none of the dangers of its formation, and that its discontinuance is actually given support by anti-trust policies of encouraging competition (Govt. Motion, p. 9; Pa. Motion, p. 7).

It is submitted that even as to the total discontinuance of the pooling arrangement the Commission's interpretation of Section 5(1) is so formalistic and mechanical as to ignore the public interest that section seeks to foster. If approval of the pooling was warranted in the public interest in spite of its anti-competitive effects and in spite of the Pullman anti-trust decrees, it is inconsistent for the Commission to conclude that anti-trust policy still encourages the dissolution of the pooling irrespective of the consequences. Statutes are not to be read so restrictively.

Besides misconstruing its responsibilities under Section 5(1) of the Act, the Commission has also overlooked the provision in the Final Judgment of the Court in the anti-trust proceeding entered May 8, 1944:

> "31. Nothing in this judgment contained shall be construed as depriving the Interstate Commerce Commission of its jurisdiction over contracts between carriers under Section 5(1) or other provisions of the Interstate Commerce Act."

Regardless of whether the Commission is or is not correct in interpreting Section 5(1) as rendering it powerless to

approve or disapprove the entire dissolution of a pooling, the Commission compounds its generalization into a total abdication of responsibility when it ends it to an alleged lack of power to approve or disapprove a "partial withdrawal" from a pooling.

Section 5(1) specifically charges the Commission with the power and responsibility to approve "any portion" of a "pooling or division of traffic, or of service, or of gross or net earnings". The statute thus provides for Commission approval when modifications in the pooling agreement are made so as to provide for participation in only a portion of the pooling. The withdrawal of one or more railroads from a pooling arrangement may have a considerable competitive effect or may have little or none. It may substantially undermine the foundations of the original statutory findings of the Commission as to "better service", or may affect the original findings only negligibly. Section 5(1) of the Act permits the Commission to investigate, "upon its own initiative". The statute directs that the Commission hold a hearing to find out what effect a portion of a pooling will have on "better service", on "economy in operation", on "competition", whether the "consideration" between the carriers is "just and reasonable", and whether "terms and conditions", including employee protection, should be imposed on continuance of the changed pooling arrangement.

When the New York Central Railroad discontinued the pooling arrangement on its local lines in 1958 the Commission ignored the statutory direction and applied its general interpretation that, since it lacked power to approve or disapprove a discontinuance of the entire pooling arrangement, it lacked power to approve or disapprove either the withdrawal of the New York Central's local lines or to reopen the proceedings for a further hearing and imposi-

tion of employee protection for the employees who lost their employment.

While appellants believed this conclusion erroneous there was also reason to believe that other railroads would not follow the lead of the New York Central. With the exception of the Rock Island, which had little sleeping car service, none has.

But that is not the type of withdrawal contemplated by the Pennsylvania in the within appeal. Pennsylvania proposes extensive amendments and modifications of the pooling agreement to change or eliminate parts thereof, but proposes to continue in the remaining portion of the pooling as modified. Pennsylvania not only would change the pooling of services but also would substantially change the pooling of earnings.

In the *Brogan* case, 211 F. Supp. 881, an officer of The Pullman Company conceded that the arrangement proposed by the modifications of the pooling agreement between Pennsylvania and Pullman was unique and that he knew of no other railroad in the United States "operating under an arrangement such as is contemplated by the September 11, 1962 contract with Pennsylvania".

The Commission has sought to make it appear that the Pennsylvania amendments of the pooling agreement are substantially similar to the New York Central withdrawal from the pool. Unlike New York Central, however, Pennsylvania and Pullman used eleven printed pages in setting forth amendments and modifications of the pooling agreement which is itself forty-nine printed pages. In the New York Central proceeding all railroads, including Pennsylvania, joined in the Central's brief to the Commission in which the distinction between a withdrawal from, as opposed to an amendment of, a pooling agreement was urged as controlling. The railroads then argued that Commission

approval was required "where an existing pooling arrangement is modified". The railroads' argument continued as follows:

> "But this is so only because substantial modification of an existing pooling arrangement amounts to the creation of a new pool. What requires approval is the new pooling arrangement and not withdrawal from or termination of the old one. Furthermore, in this (N. Y. C.) case, the pooling agreement is being continued unchanged in any event, and there is no modification whatever."

Pennsylvania did the very thing that the railroads said New York Central hadn't done, that is, change the pooling agreement. Yet the Commission says that it doesn't see any necessity for "an evidentiary hearing" to determine the impact of Pennsylvania's proposed changes in the approved pooling agreement, or whether the changed arrangement is in accord with the 1947 and 1949 findings of the Commission approving the pooling which Pennsylvania seeks to change (268 I. C. C. 473, 276 I. C. C. 5).

The Commission now euphemistically describes Pennsylvania's proposed new pooling arrangement as a "partial withdrawal" and readily concludes that Section 5(1) of the Act is not applicable.

No matter whether this is a "partial withdrawal", or an amended and therefore new pooling agreement, it is plain that the Congress intended for the Commission to look into such a different situation. Will the new plan be in the interest of better service to the public or of economy in operation? Will the new plan unduly restrain competition? What rules and regulations will the Commission prescribe? What consideration as between the carriers and what terms and conditions will the Commission approve? Will the Commission find the terms and conditions "to be just and reasonable in the premises" if the Pullman conduc-

tors thus forced into unemployment are ignored by the Pennsylvania's plan? In its consideration of "economy in operation", what provisions will the Commission make for the Pullman conductors at whose expense the "economy in operation" is planned to be achieved?

Thus this appeal raises the fundamental question of employee job protection under Section 5(1) of the Interstate Commerce Act.

Determination of "Reasonable and Non-Discriminatory Terms" Under the Uniform Service Contract.

The pooling arrangement approved by the Commission in 1949 provided that on request of a pooling member Pullman would furnish "partial service on reasonable and non-discriminatory terms;" and that the pooling "contract shall be subject to such modification as may, in the particular case, be necessary to provide reasonable and non-discriminatory terms therefor."

One would suppose that the determination of what were "reasonable and non-discriminatory terms" would include not only the rights of the other pool members and of Pullman but also the rights of employees affected by the new terms in view of this Court's decisions in *United States* v. *Lowden*, 308 U. S. 225 and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373.

But Pennsylvania has never submitted to anyone the question of whether the terms are "reasonable and non-discriminatory". Instead, it succeeded in obtaining from the Commission the order now under attack which finds that Pennsylvania's new contract is "fully contemplated by the terms of the pooling agreement", does not violate the Commission's prior orders, and does "not require our specific approval."

The Commission, in explanation of its conclusion that the Pennsylvania amendments do not constitute a change in the pooling, says that:

> "Section 2 of the Uniform Service Contract, previously approved by the Commission (in 1949), specifically provided for this contractual method of implementing the railroad's right to obtain a partial service from Pullman" (Govt. Motion, pp. 4-5, 9).

But nowhere in Section 2 is there any provision that modifications of the pooling agreement may be made without the Commission's prior approval. The Commission's order is also silent as to who should decide what are "reasonable and non-discriminatory terms" for the partial service requested. The Honorable Joseph Samuel Perry, who dissented in the Court below, begins his opinion with the following discussion of this point (J. S. xiv):

> "In my opinion, both the Commission and the defendants here lean too heavily upon Section 2 of the Uniform Service Contract which was approved by the Commission. That Section provides that a railroad, which itself desires to furnish part of the service in connection with its sleeping car operations, may request that Pullman furnish a partial form of sleeping car service on lines of the railroad, whereupon Pullman shall furnish such partial service on reasonable and non-discriminatory terms. The concluding clause of the Section, however,—which provides that the contract shall be subject to such modification as may, in a particular case, be necessary to provide reasonable and non-discriminatory terms therefor—has been read by defendants to permit, ad infinitum, future contract modifications, and all without obtaining the prior approval of the Commission, apparently on the ground that Commission approval of the Uniform Service Contract is approval of such future modifications."

We respectfully submit that in approving the pooling agreements in 1947 and 1949, the Commission certainly

did not approve in advance the Pennsylvania's proposed amendments and modifications which were not even devised until 1962.

Use of Pullman Conductors Contemplated Under the Pooling Plan.

The Commission says that it refused the appellants' request for protection in the 1947 Commission proceedings and that no review of the Commission's denial was sought. But in 1947 the Commission assured the employees that a protective order was unnecessary because they were part of the pooling plan saying (268 I. C. C. 473, 490):

> "The plan clearly contemplates use of the present Pullman employees in the unified service, since one of the advantages claimed for the plan, as previously stated, is the availability of a reserve of trained workers in Pullman service."

Now the Commission has reversed itself and has held that the plan always contemplated that the pooling might be amended so as to eliminate the employees from the pooling plan and throw them out of work without a protective order.

Right of Employees to Protective Conditions.

The Commission suggests that Pullman employees who lose their livelihood "may not be heard to urge that a railroad's right to perform part of its own sleeping car service should be restricted by the imposition of protective conditions . . ." (Govt. Motion, p. 10). This is an astounding misconception of the nature of protective conditions for employees. Protective conditions are not imposed in derogation of the railroad's rights, but in recognition that by exercising them the railroad will achieve great savings at the expense of its employees who should not be forced to

bear the entire burden of the loss, while the railroad reaps the entire gain. This principle has long been recognized by Congress, by Emergency Boards appointed under the Railway Labor Act (45 U. S. C. Sec. 151, et seq.), and by this Court. One of the earlier statements of the principle appears in the report of an Emergency Board appointed March 30, 1929, to investigate a dispute on the Texas & Pacific Railroad Co. arising from the railroad's exercise of its right to change its terminals thereby resulting in substantial losses to employees in depreciated property values and moving expenses. The carrier estimated that the changes would bring annual savings to it of not less than 15%. The Emergency Board, recognizing the carrier's right to make the change, nevertheless said:

> "The change from Longview Junction to Mineola and from Marshall to Shreveport will result in a substantial saving for the carrier. It is not fair, we think, that the carrier reap the entire benefit and that the employees be compelled to bear the entire loss. • • • We are therefore constrained to the view that in the circumstances here presented the loss should be borne equally by the carrier and the employees."

In other cases the Commission has voluntarily, and in the absence of a mandatory statutory direction, granted protection to employees whose livelihood was destroyed by the exercise of railroad privileges approved by the Commission. In *United States* v. *Lowden*, 308 U. S. 225, this Court sustained the Commission's authority to impose protective conditions under general statutory authority, similar to Section 5(1), to attach such terms and conditions as it may find "to be just and reasonable".

The Commission, however, in *I. C. C.* v. *Railway Labor Assn.*, 315 U. S. 373, denied its authority to impose protection for the employees' loss of livelihood in a railroad abandonment resulting in a net annual savings to the rail-

road of $378,000, of which $302,000 per annum "would be due to a net wage loss suffered by employees." This Court affirmed the judgment of a three-judge court setting aside the Commission's order and again affirmed the Commission's power to impose protective conditions, saying:

> "It was not until 1935, fifteen years after the passage of § 1 (20), that the Commission first decided that it was without power to impose conditions for the protection of workers in an abandonment. Chicago G. W. R. Co. Trackage, 207 I. C. C. 315, 322. At that time, the Commission took the position that requiring displacement allowances as a condition would be the equivalent of granting a private benefit to a particular group of workers, and therefore beyond the scope of authority granted by Congress. The Commission has taken the same position here. It must not be forgotten, however, that the immediate result of permitting the abandonment itself is a private benefit for the railroad in the form of savings realized by discontinuing uneconomic services. The justification lies in the benefit to the transportation system which the Commission concluded the abandonment would produce."

Basic Contention of Appellants: Section 5(1) of the Interstate Commerce Act Requires That the Pennsylvania-Pullman Revision of the Pooling Be Submitted for Approval of the Commission.

At page 7 of its Motion the Commission declares:

> "1. Appellants' basic contention (J. S. 18-19) is that a railroad cannot choose to obtain only a partial service from Pullman, but must either accept all services offered by Pullman or withdraw part or all of its lines entirely from the Pullman pool."

A re-reading of pages 18 and 19 of the Jurisdictional Statement by the appellants discloses no such "basic contention." These pages are a part of the subdivision beginning

at page 13 of the Jurisdictional Statement which is entitled as follows:

> "'Section 5(1) of the Interstate Commerce Act Requires That the Pennsylvania-Pullman Revision of the Pooling Be Submitted for Approval of the Commission.'"

This subdivision heading succinctly states the appellants' "basic contention."

Appellants' Right to an Evidentiary Hearing.

The Commission at pages 11-12 of its Motion defends its denial of the appellants' request for an evidentiary hearing. The Commission notes that hearings, in which the appellants participated, were held prior to the Commission's approval of the pooling agreement in 1947. The presumption apparently intended is that this was hearing enough for the appellants.

The Commission also comments that it had found that appellants "had demonstrated 'no material changes in circumstances affecting railroad sleeping car service, . . .'." Just how the appellants were to have made the demonstration without being permitted an evidentiary hearing is not indicated.

The Commission observes at page 12 of its Motion that "appellants did not question before the Commission that the provisions of the contract were 'reasonable and nondiscriminatory,'." The appellants appeared before the Commission in opposition to the petition of the Pennsylvania for a declaratory order. The Pennsylvania did not ask for a finding by the Commission that the provisions of the Uniform Service Contract, as amended by the Pennsylvania, were "reasonable and non-discriminatory". Instead, the Pennsylvania asked the Commission to find that the arrangement proposed for the performance of partial

sleeping car service "does not require the specific approval of the Commission under Section 5(1) of the Act. . . ." The appellants resisted the Pennsylvania's petition and asked that a hearing be set for the introduction of evidence. This was denied.

The Commission Lacked Jurisdiction to Determine That the Collective Bargaining Agreement of Pullman Conductors Would Not Be Abridged by the Proposed Changes.

The Commission asserts in its motion that its order under review doesn't make any determination in respect to appellants' collective bargaining agreement (Govt. Motion, pp. 10-11). We submit that the order under review speaks for itself. In its order the Commission specifically "finds" that "the current proposal" of Pennsylvania will not result in any "abridgement" of appellants' collective bargaining agreement (J. S. xxiii-xxiv). It is apparent that the Commission was unable to resist its own interpretation of appellants' collective bargaining agreement. It has even persisted in interpreting it, not only in the order under review, but throughout argument of its motion (Govt. Motion, pp. 7, 10, 11). In attempting to interpret appellants' collective agreement the Commission has ventured far outside its jurisdiction. It is respectfully submitted that the Commission ought not to engage in the unfamiliar field of analysis and interpretation of railway collective bargaining agreements and on the basis of its interpretation of such agreements decline to hold the hearing required by Section 5(1) of the Act.

Conclusion.

We urge that the questions presented in this case are substantial and that they are deserving of this Court's review.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1093. Decided June 12, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted and the case set for oral argument.